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The Federal Labor-Management

Consultant

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God Rest Ye Merry, Gentlemen

Management erred by refusing to bargain on a joint union proposal that employees be granted administrative leave rather than annual leave when the activity curtailed operations for a four or five day period. This Federal Labor Relations Authority decision dismissed objections by the Long Beach Naval Shipyard, California that the proposal was inconsistent with government-wide regulations and accordingly outside the duty to bargain.

The dispute arose when the shipyard planned to shut down operations during the Christmas-New Year holiday period, and told employees not needed for essential services to use annual leave. In response, three unions — the International Federation of Professional and Technical Engineers, American Federation of Government Employees, and Federal Employees' Metal Trades Council—together proposed that administrative leave be granted instead.

The decision noted that although there was no general statutory authority for administrative leave, it was firmly established that agency heads have the discretion to grant it to employees in certain situations for brief periods of time.

A Federal Personnel Manual Supplement expressly provides that administrative leave may be granted in connection with the temporary closing of an activity "for short periods of time not generally exceeding three consecutive workdays." It may not be granted "in situations of extensive duration or for periods of interrupted or suspended operations" ordinarily covered by regular leave, furlough, or the assignment of other work.

The Authority concluded that the FPM regulation does not establish three days as the absolute time limit for which administrative leave may be granted in connection with a temporary closing. "Rather, the use of the word 'generally' amounts to express acknowledgment that discretion is left to the agency to determine the actual duration of the leave to be granted, if 'warranted by good administration,' so long as the period of time for which such administrative leave is granted is 'short.' " In the Authority's view, four or five days is a brief period of time.

Although the regulation states generally that administrative leave may not be used for situations ordinarily covered by annual leave, etc., the Authority found that it specifically provides that administrative leave may be granted when for managerial reasons, an establishment must be closed for short periods.

Thus, said the Authority, the unions' proposal is within the shipyard's discretion and within its duty to bargain. *(7 FLRA No. 53—December 16, 1981)* The Authority noted that the right of management to layoff employees was not involved in the circumstances of this case.

Authority Knocks Out Per Diem Award, Says Not Authorized by Back Pay Law

An arbitration award ordering retroactive payment of per diem to employees who were not in travel status for the days involved was modified by the Federal Labor Relations Authority. The Authority judged that since the Community Services Administration employees had not actually incurred subsistence expenses, no per diem could legally be granted. The Authority let stand that part of the award dismissing claims by the American Federation of Government Employees Council that the Sunday travel be compensated.

The training program began at 9 a.m. on Monday and ended at noon on Friday. The arbitrator, Seymour Strongin, found that the CSA violated the parties' agreement by not scheduling training so as to allow employees to travel during their regularly scheduled work week. He further found that the training should have been scheduled to start on a Tuesday and end on the subsequent Monday. Due to the activity's scheduling, he concluded, employees lost one day of per diem for Saturday and a second day of per diem for Sunday.

The Authority agreed with the employer's exception that the award was contrary to law because the employees were not in a travel status the two days in question. *(7 FLRA No. 32—November 19, 1981)*

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

No Excuse for Leave Abuse

Casefacts: The grievant, a computer operator at the U.S. Railroad Retirement Board, was discharged in December 1980, assertedly for absence from duty without permission and without proper justification. Her union, American Federation of Government Employees Local 375, took her case to arbitration.

Under the parties' agreement, leave without pay must be approved or disapproved in accordance with Federal Personnel Manual criteria. The Board's employee handbook says LWOP is not a matter of employee right, but of administrative discretion. Absence without leave includes absence from duty for which a leave request has been denied.

Management maintained that the discharge was precipitated by the grievant's repeated absenteeism, culminating in 36 continuous days of AWOL when her request for leave without pay was denied. In 1978 she was absent 31 percent of the time, and in 1979, 42 percent. In 1980, up to the time of her dismissal, she had exhausted all her sick and annual leave and had been granted 226 hours of LWOP.

A fitness for duty examination showed no evidence of a chronic disease which would prevent the computer operator from doing her job.

The grievant had been repeatedly counselled and warned both orally and in writing that continued absences might result in discipline and dismissal. Prior to her dismissal, however, no disciplinary action had been taken.

According to her supervisor, he had denied her latest LWOP request because he did not believe her "reasons for continued absence were justified . . . Her record showed no hope for improvement. Shop morale suffered and productivity suffered."

The union contended that the employer had not refuted the grievant's claim that the absences were due to the illnesses of herself and her son. The supervisor failed to allow her to substantiate the validity of the latest absence. Further, progressive discipline had not been imposed prior to the discharge.

Issue: Was the discharge for just cause and in accordance with applicable regulations and the collective bargaining agreement?

Award: Arbitrator Samuel Edes denied the grievance.

The critical question, he said, was not whether the grievant's absences on the occasions prior to her dismissal, or even on earlier occasions, were in fact due to illness either of herself or of her son and other members of her family. There may have been a basis for doubt that she was ill for the very substantial periods during which she was absent. The medical report indicated at least that she did not suffer from any chronic disease which would warrant her absences.

"There was evidence also that at least some of her absences were timed to coincide with occasions when her work assignments involved distasteful and less attractive chores. However, giving her the benefit of every doubt concerning the validity of her absences, the fact remains that she was not available to perform her job with any degree of reasonable reliability.

"An employer has a right to expect that an employee be ready, willing and able to perform his job on a reasonably regular basis. This is a principle which is fundamental and which has been repeatedly recognized. Whatever the reason for the failure to be at work, including totally defensible and entirely legitimate illness, an employer has the right to terminate employees who cannot be depended upon to be at work with consistent regularity.

"Frequent and extended periods of absence—particularly where absences are intermittent and unpredictable and which make it impossible for the employer to operate efficiently—simply cannot be tolerated."

The number of absences over a three-year period was excessive by any reasonable standard, the arbitrator commented. This was not a case in which the employee suffered occasional disabilities which by their nature required extensive periods of time off which could with reasonable certainty be predicted and provided for. This absenteeism was chronic, repeated, and entirely unpredictable.

The employer's action was not taken hastily or without consideration for the grievant's problem. If anything, the Board's tolerance went far beyond what could normally and reasonably be expected. It even provided her with training to undertake a job on a shift which would avoid or minimize her need to secure a babysitter for her son.

In Arbitrator Edes' judgment, suspension or other types of progressive discipline were futile when the grievant was already continually absent. The supervisor had warned her that this might cost her her job.

"Guidelines as to progressive discipline are to be followed when the effect is useful in correcting the problem," the arbitrator concluded. "Future improvements of the grievant's record seemed more than bleak, especially when she would not only have a mother and son to care for, but also a newborn baby. The agency was entitled to so conclude." *(U.S. Railroad Retirement Board and AFGE Local 375—July 15, 1981. LAIRS No. 13497).*

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NTEU's Layoff Proposal Not Bargainable

Failing to persuade the Federal Labor Relations Authority that its proposal for evaluating seasonal and temporary employees was negotiable, the National Treasury Employees Union lost its bid to insure the use of what the union regards as equitable furlough and recall procedures. Because the union proposal would directly interfere with the Internal Revenue Service's determination of *which* employees to lay off, the Authority held that it violated management's statutory rights.

On its face the proposal concerns only weights and factors for rating WAE workers. The union explained, however, that the intent was to establish a ranking procedure requiring IRS, once it decided to furlough, to do so by order of rank based on the proposal's criteria. The employee with the lowest evaluation would be the first furloughed and the last recalled—thus restricting management's exercise of layoff rights.

The Authority added that a proposal explicitly drafted to conform to the union's stated purpose of establishing equitable furlough and recall procedures would be within the agency's duty to bargain. Such a proposal could concern procedures for management to follow in exercising rights without imposing a limitation.

Another NTEU proposal which gave a local union's chief officers clearance to enter all work areas was also held nonnegotiable. The agency restricts access to certain work areas in order to prevent unauthorized disclosure of tax information, and the IRS argued that allowing union representatives to enter all areas would negate this practice. The Authority agreed with IRS that the restricted areas concern the determination of internal security practices, a protected management right.

Three additional union proposals dealing with the filling of positions were found to be bargainable and not inconsistent with management's right to make selections. *(7 FLRA No. 42—November 25, 1981)*

Tune in Tomorrow and See What Happens

There has been another skirmish in the National Guard's five-year resistance to Federal Labor Relations Council and Authority decisions holding negotiable union proposals on the wearing of military uniforms by civilian technicians. The latest episode took place when the Authority ordered the Nevada NG to cooperate with a Federal Service Impasses Panel decision supporting the union position. The Panel had directed the activity to adopt Panel-recommended language, based on National Association of Government Employees' proposals, allowing technicians to wear either uniforms or standard civilian attire.

The issue first arose in 1976 under the then-governing Executive Order 11491 when several unions proposed that technicians not be required to wear uniforms while working in a civilian status. (Under the National Guard Technicians Act, technicians must become Guard members as a condition of employment, attend four training sessions a month, and spend 15 days annually at Guard encampments.)

The activities refused to bargain on the grounds that the proposals conflicted with a NG Bureau regulation mandating the wearing of military attire by technicians. The former Federal Labor Relations Council held that the Guard failed to demonstrate that the regulation was essential to its mission. The Council accordingly set aside the agency's claim that the proposals were not negotiable.

After the Council's determination, several sets of Guard negotiations went to impasse on the issue. The Panel, under the Order, recommended that the parties adopt Panel-drafted language giving employees the choice of wearing uniforms or standard civilian dress, and bargain over any occasions requiring uniforms. When Guard agencies rejected the advice, the Panel ordered them to follow its recommendations.

The Nevada Guard, balking at compliance, sought a court stay of the Panel's order, but the Federal appeals court dismissed the petition for lack of jurisdiction.

NAGE then filed an unfair labor practice charge on the Nevada activity's refusal to obey the Panel order. The Authority held that the agency's request for judicial review was not a defense against noncompliance. Moreover, the Panel's show-cause approach was authorized by both the Order *and* the new Federal sector law.

In its recent decision the Authority noted that judicial review of a Panel order depends on an agency's having been found guilty by the Authority of an unfair labor practice for noncompliance. The decision thus opens the door for court review of the negotiability issue. *(7 FLRA No. 37—November 19, 1981)*

Downstairs, Upstairs

Moving employees from one floor to another is not a substantial change in conditions of employment, and the activity has no duty to bargain on it. So ruling, the Office of the General Counsel of the Federal Labor Relations Authority denied an unfair labor practice charge filed by Local 2302, AFGE. The union failed to establish that the move from the basement to the third floor at an Army building resulted in a material change adversely impacting on bargaining unit employees. *(Case No. 4 CA-888, October 29, 1981)*

It's All in the Day's Work

The Federal Labor Relations Authority again has upheld the bargainability of a union proposal on paid time for labor negotiators to consider and prepare responses to management proposals and counterproposals. The Association of Civilian Technicians asked that its team be granted official time for preparations equal to the amount granted for this purpose to management negotiators at the New Hampshire National Guard. The asked-for time was to cover the period between ACT's receipt of the Guard's proposals and the first negotiating session.

The use of official time for preparations is not a statutory union right, the Authority said, but rather a matter within the employer's duty to bargain. In its judgment, union review of the employer's proposals and counterproposals constitutes preparations.

In reaching its conclusion, the Authority relied on an earlier decision, the Mather Air Force Base case *(3 FLRA No. 47)*, in which it had ruled negotiable the use of official time by union representatives preparing for collective bargaining negotiations. *(7 FLRA No. 36—November 19, 1981)*

No Grounds for Not Bargaining

The Internal Revenue Service is obligated to bargain on five union proposals regarding a procedure for counting the work completed each day by employees. The Federal Labor Relations Authority has ruled that the proposals are negotiable and do not interfere with protected management rights to assign and direct employees and to assign work.

The agency had decided to adopt a uniform, nationwide system for counting units of work. The National Treasury Employees Union, concerned because the amount of completed tasks is used in rating the quantity factor of employees' performance standards, wanted to ensure that the way in which the work was counted was equitable. The union explained that it was not trying to negotiate on the agency's right to count work and establish a nationwide system, but merely to prescribe a counting procedure.

The IRS contended that not only did the proposals violate its statutory rights, they also concerned methods and means of performing work—an area in which management has the option to bargain or not bargain.

The Authority, however, found for the union. The proposals relate to the counting of work after the agency has determined, at its sole discretion, to assign the work and direct the employees to accomplish the work through the establishment of quantitative performance standards. The employer may adjust these performance standards to accommodate the manner in which work is to be counted. In no manner, the Authority said, would the proposals limit management's authority.

A sixth NTEU proposal called for the count to be made by a research control clerk and approved by the immediate supervisor. In the Authority's judgment, this proposal was not negotiable. Because the proposal mandates that certain work be performed by a particular employee or position, it deprives management of the discretion to identify the employees to whom such work will be assigned. *(7 FLRA No. 35—November 19, 1981)*

Authority Says FDIC Must Bargain on Performance Appraisal Systems

Contrary to allegations of the Federal Deposit Insurance Corporation that as a government corporation it would be contrary to law for the agency to be required to establish a performance appraisal system, the Federal Labor Relations Authority ruled that while FDIC is not required, neither is it precluded from establishing a system. Thus, the agency does have a duty to bargain over union proposals on the subject.

The FDIC had argued that since it was a government corporation, it was excluded from the definition of executive agencies subject to 5 USC chapter 42 on performance appraisals. Moreover, the employer contended, the proposals of Local 3804, AFGE conflicted with an agency regulation on performance evaluation for which a compelling need existed. These arguments were rejected by the Authority.

The Authority then proceeded to rule on the negotiability of AFGE proposals dealing with employee performance appraisal systems. It found the eight proposals to be negotiable in whole or in part. *(7 FLRA No. 34—November 19, 1981)*

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New Developments Checklist . . .

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Tinkers to Evers to Chance

On remand from a Federal appeals court, the Federal Labor Relations Authority itself remanded the arbitration award to the parties so they could obtain a clarification and interpretation of the award from Arbitrator Edwin Render. The arbitrator is to specify whether the employer's imposition of discipline was motivated in whole or part by consideration of the grievant's union activities.

The case began in 1978 when the Federal Correctional Institution suspended the grievant for 21 days for eight instances of alleged misconduct. Local 1286, AFGE maintained that because management's actions were motivated by anti-union bias, the suspension was not for just and sufficient cause.

The arbitrator found that the grievant was guilty of misconduct in five of the eight instances. He agreed with the union that some of the management action involved discrimination. The arbitrator noted, however, that the finding that an employer's action was motivated by reasons other than those formally charged "does not in and of itself preclude an arbitrator from imposing discipline where the grievant has engaged in misconduct." He reduced the suspension to seven days.

AFGE filed an exception to the award on the grounds that the arbitrator exceeded his authority and that the award did not draw its essence from the contract. The Authority, judging that the union had not proved its case, sustained the award *(3 FLRA No. 111, 1980)*.

The union went to court where for the first time it raised the issue that the award was contrary to law. Management's disciplinary action occured in 1978 when Executive Order 11491 was still in effect. The union pointed out that under the Order, if agency discipline were in part motivated by an employee's union activities, the discipline was unlawful even if the employer had a legitimate basis for discipline. (This is not the test under 5 USC 71 whereby it must be established that the discipline would not have originally occurred but for an employee's union activities.)

Because of the significance of the newly raised issue and because the union's exceptions filed with FLRA did not contend the award was contrary to law, the Authority requested the court to send the case back to the Authority so that it could consider this question before consideration by the court. The U.S. Court of Appeals for the District of Columbia granted the Authority's request.

The Authority observed that although the union's exception was filed under the statute, the Executive Order was applicable because the discipline was imposed in 1978. If the award were contrary to the Order, it would be found deficient.

The Authority said it was unable to ascertain from the award whether the arbitrator sustained the discipline in any instance where he found management's actions to have been discriminatorily motivated. Because of this uncertainty, it remanded the award to the parties to have them obtain a clarification and interpretation from the arbitrator. The parties' request was to indicate that it was for the limited purpose of having the arbitrator specify whether, where he sustained the suspension, management was motivated by union animus. *(7 FLRA No. 50—December 14, 1981)*

Bargaining on Standards of Conduct

A union proposal permitting employees to accept unlimited loans from agency-regulated lending institutions has been found negotiable by the Federal Labor Relations Authority. The Federal Home Loan Bank Board was unable to prove that the union's proposal violated Federal sector labor law or other statutes or government-wide rules and regulations concerning standards of conduct. Nor was the Board able to establish that a compelling need exists for its regulation restricting the number of loans bargaining unit employees can get from agency-regulated institutions.

Consequently, the Authority ruled, the FHLBB must bargain on the proposal—a carryover from the parties' prior agreement—permitting unlimited loans as long as they are fully disclosed to the employer and the terms granted employees are no more favorable than would be available to non-agency employees in like circumstances

The union proposal reflects the FHLBB conflict of interest regulation in effect when the old contract was negotiated. During the course of the agreement, the Board unilaterally adopted a new regulation limiting loans. In negotiations for a new contract, Local 3385,

(Continued on page 4)

Pm 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Two Sleepy People

Casefacts: In the opinion of the union, the joint safety committee was not functioning well. Management at General Services Administration's Region 3 had failed to schedule necessary meetings and generally showed disinterest. To add insult to injury, several management appointees allegedly fell asleep during committee meetings. Local 2151, AFGE filed a grievance and pursued it to arbitration.

The parties' joint union-management safety and health committee was created in 1975 under the bargaining agreement and the mandate of Executive Order 11807. The contract required that three members be appointed by management, three by the union, and a seventh, the chairperson, by GSA's chief of the Accident and Fire Prevention Branch.

The committee must meet monthly "or more often as necessary." Its purpose is to assist the branch chief, and the assistance may include investigation of unsafe or unhealthy working conditions, review of reports, and development of an incentive awards program.

When first established, the committee met regularly once a month to discuss safety matters, and usually a second time to visit work sites.

Then a new Executive Order on occupational safety and health programs was issued. In accordance with the Order, GSA adopted rules creating a three-tiered system with committees at the national, regional and establishment levels. Health and safety functions were transferred from the Accident and Fire Prevention Branch to the Office of Administration.

Management unilaterally cancelled the committee meetings for January and February 1981. It dispensed with the meeting held a second time each month, saying that investigations should be made only in known situations. Under the revised rules, accident reports were no longer a function of the Fire Prevention Branch and hence not a committee function.

The employer argued that while the joint committee would continue to operate under contract provisions, it was appropriate for the committee to make its own determinations on the frequency of meetings and the need for investigations. Management had acted in good faith on safety and health matters and had invited the union to nominate a committee member for the new regional committee.

AFGE accused management of downplaying the committee's importance through lack of participation. In addition to an occasional catnap, the union charged, activity appointees seldom made suggestions and failed to discuss alternative safety standards. GSA had not scheduled meetings or designated a chairman.

Issue: Through its actions in cancelling the joint committee meetings of January and February, refusing through its majority control to continue to schedule meetings in excess of once a month or to approve general on-site investigations, and the establishment of the three-tiered committee system without prior discussion with the union, did the employer breach the terms of the agreement.?

Award: Arbitrator Robert Bennett Lubic found partly for the union and partly for management. GSA had not violated the agreement by discontinuing through the joint committee the past practice of general on-site inspections. He found, however, that the GSA through its Office of Administration violated the contract by failing to nominate a member from that division to serve as committee chairperson, and he ordered the activity to do so.

The clear meaning of the contract is that the committee meet monthly or more often as necessary and that its members determine its functions. Thus it was not a contract violation for management through a majority vote cast by its nominees to discontinue the past practice of more than once a month meetings for inspections.

Looking to AFGE allegations that management downplayed the committee's importance, the arbitrator upheld the union. Despite the fact that new procedures were required by the new Order, the contract was still in effect and required compliance. "A collective bargaining agreement should be construed so as to accomplish its aims by a determination of the intent of the parties at the time the agreement was written."

Arbitrator Lubic judged that "It was clearly the intent of the parties at the time of the adoption of the collective bargaining agreement that the joint committee serve a valid function rather than develop into a sterile forum for meaningless debate." Since health and safety functions were transferred from one branch to another, the committee functions could have no meaning without participation by members of the Office of Administration.

Even though the national and regional committees were created as part of the three-tiered committee structure, the joint committee still remains as a valid presence to serve the functions accorded it under the contract, and it requires regular participation by the GSA division exercising jurisdiction over safety and health.

He ruled that the committee must continue to meet at a minimum of once a month and determine by majority vote and in good faith its agenda and functions as well as whether to hold additional meetings. *(GSA, Region 3 and American Federation of Government Employees Local 2151—May 26, 1981. LAIRS 13381)*

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No Right to Representation

Did the employee have a right to union representation at a meeting where his supervisor told him he could either quit or be fired? Not according to a ruling by the Office of the General Counsel of the Federal Labor Relations Authority.

The employee at Lackland Air Force Base, Texas was observed by his supervisor allegedly violating regulations on the use of an agency vehicle. That same day the supervisor confronted the worker with the ultimatum of resignation or discharge. When the employee asked for union representation, he reportedly was told his request would be denied until he had signed a letter of resignation.

The GC noted that the meeting did not involve a discussion of the events leading up to the meeting. Consequently it was not an examination in connection with an investigation within the meaning of the Federal Service Labor-Management Relations Statute. Nor was the meeting a formal discussion of grievances, personnel policies or practices or other general conditions of employment within the meaning of the act. Since neither of these situations existed, the employee had no representation rights under section 7114(a)(2)(A) and (B).

The GC accordingly determined that the purported denial of representation was not an unfair labor practice by the activity. *(Case No. 6 CA-1193, November 30, 1981)*

NTEU Seeks Security Search Bargaining

The Federal Labor Relations Authority has ruled negotiable a union proposal concerning security checks of desks and file cabinets at the Internal Revenue Service. According to the Authority, the agency did not establish that the proposal was inconsistent with management's protected rights to determine internal security procedures and methods and means of performing work.

IRS had decided to conduct after-hours searches to see if any protected tax material was left in unlocked desks and file cabinets. If found, the material would be removed and secured elsewhere.

The National Treasury Employees Union wanted to modify the procedure so that the agency would simply secure all unlocked space without first searching to see whether protected material was actually inside. Searches would be postponed until the employee normally using the desk was present. Further, the procedure would not be implemented until the parties reached agreement or impassed over the NTEU proposal.

"It is well established," the Authority said, "that procedures to be observed by management officials in the exercise of their statutory authority . . . are within the duty to bargain unless, if adopted, they would deny such authority by preventing the agency from acting at all to exercise it." In this case, the procedure was designed to detect security risks and apply protective measures, and the union proposal would not prevent management from reaching these objectives. Rather, the proposal merely modified the procedure by requiring IRS to postpone a search until the employee was present.

The modification would be consistent with the agency's internal security practice so long as the agency could lock the unlocked desks and cabinets, and do so in a manner assuring that the contents would not be altered before a subsequent search in the employee's presence. The agency had not claimed that it was incapable of following this procedure, the Authority noted, and it offered no information to support a finding that the union proposal would preclude achieving management's objectives.

The Authority reasoned that the NTEU's suggested changes and the possible delay in implementation did not violate management rights. Consequently, the proposal was bargainable. *(7 FLRA No. 47—December 8, 1981)*

Authority Overturns Arbitral Award Involving Seniority in Promotion

An arbitration award directing that a promotion action be rerun and the promotion awarded to the candidate with greater seniority has been set aside by the Federal Labor Relations Authority. The Authority found the award contrary to FPM chapter 335 which protects the employer's right to select with respect to filling positions by competitive promotion.

In ruling on the grievance, Arbitrator Raymond L. Britton concluded that the National Labor Relations Board had violated a contract clause requiring it to select the senior employee when the qualifications of candidates are equivalent. The NLRB Union was the exclusive representative in the case.

The Authority was persuaded by the agency's argument that the contractual requirement violates chapter 335 and consequently an award enforcing that provision was deficient. *(7 FLRA No. 87—January 7, 1982)*

(Continued from page 1)

AFGE suggested that the relevant clause from the expired contract be incorporated into the new one.

Management refused to bargain on the grounds that Executive Order 11222 on standards of ethical conduct and a government-wide OPM regulation implementing the Order mandate agencies to promulgate rules prescribing standards of conduct.

The Authority, however, found that agencies have "discretion to define and delineate specific standards of conduct before submitting them to OPM for approval. Neither the cited Executive Order nor the [OPM] regulation provides that an implementing agency regulation cannot be negotiated." Moreover, neither contains specific requirements inconsistent with the AFGE proposal.

"To the extent that an agency has discretion with respect to a matter affecting conditions of employment of its employees, that matter is within the duty of the agency to bargain consistent with law, rules and regulations," the Authority judged. And contrary to the FHLBB's contention, the disputed proposal did not violate management's protected right to discipline employees.

Turning to the agency's compelling need argument, the Authority found it undone by past practices. Although the Board insisted that its standard of conduct regulations are essential to the agency's mission, the Authority commented that the FHLBB did not appear unable to accomplish its mission from 1973 to 1977 under the previous regulation. Thus the Board had not met its burden of demonstrating that the regulation was essential. *(7 FLRA No. 58—December 18, 1981)*

The Threshold Issue of Time Limits for Petitions

In a threshold issue in the same case, the Authority dismissed the FHLBB's claim that the union petition for a negotiability review was untimely since it was made more than five months after the filing deadline permitted by law.

The record showed that during negotiations the agency notified AFGE in writing in January and March 1979 that two of its proposals were not bargainable. The union did not appeal at that time. Later, the union formally requested the agency's position on the negotiability of the proposal. The agency allegation rendered in response to the union request was received by Local 3385 on June 18, 1979, and the union filed a petition with the Authority on July 2.

The law provides that a union appeal must be filed within 15 days from the date the agency first makes an allegation that a matter proposed for bargaining is not within the duty to bargain. Under the Authority's rules, the clock does not start ticking on the time limit until after the union requests such allegation in writing and the agency responds in writing.

The Authority noted that its rule clarifies *which* agency statements constitute "allegations" and *when* the allegations are made, thus avoiding disputes and delays. An agency allegation must be made only in response to a union's request for an allegation.

According to the Authority, the rule ensures that a union will not be diverted from further negotiations and forced to file an appeal before it wishes to do so, simply to avoid losing its right of appeal by the running of the time limit. It enables a union to propose alternatives or bargain over employer counterproposals as a means of resolving the dispute without invoking third-party intervention.

The Authority accordingly found the AFGE petition to be within the 15 day limit.

Panel Ends Navy-SEIU Impasse

The Federal Service Impasses Panel, to resolve a bargaining stalemate, ordered the parties to adopt the union's proposal on performance rating credits for RIF purposes. Service Employees' International Union won its argument for the use of ratings given within the past 10 years. The Navy Exchange Service had wanted to use only current ratings to determine RIF performance retention credits (in addition to credits for years of service) for unit employees who are in the excepted service and not covered by FPM requirements.

SEIU proposed that employees get six months credit for each "outstanding" rating and three for each "very good" rating within the preceding decade, with a maximum credit of four years. The Exchange proposed four years for "outstanding" and two for "very good" current ratings.

The Panel, basing its decision on written submissions from the parties, found "merit to the argument that past contributions of employees should be considered in the preparation of retention registers for reduction-in-force purposes . . . A system for basing performance rating credits only on current ratings affords scant recognition for past service and has the potential for abuse. We conclude, therefore, that the union's proposal provides a more reasonable basis for the resolution of the impasse before us." *(Case No. 81 FSIP 114, October 14, 1981)*

Consultant

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The Federal Labor-Management

Consultant

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DEPOSIT

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No Right to Official Time Unless Member of the Unit

The Federal Labor Relations Authority has held that entitlement to official time for negotiations is limited to union representatives who are employed in the bargaining unit for which the contract is being negotiated. The Authority's ruling rejects contentions of its General Counsel and the union that the law provides official time to *any* Federal employees representing a union in government negotiations.

The case involves the Wright-Patterson Air Force Base, Dayton, Ohio and Local F-88 of the International Association of Fire Fighters. The local is the exclusive representative of fire fighters at the base. It also represents fire fighters employed by the Defense Department's Electronics Supply Center (DESC) in Dayton.

The local's president and its chief negotiator both work at the base. The union asked the Air Force to grant them paid time for the period the two would be engaged in negotiating an agreement with DESC on behalf of the union. Wright-Patterson denied the request.

The Fire Fighters and the Authority's General Counsel alleged that the base's refusal to grant official time in these circumstances was contrary to the law (5 USC 7131(a)). They argued that the law clearly provides official time to "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement."

The Air Force and the Office of Personnel Management, as *amicus curiae* (friend of the court), contended that when the section is read in the context of the statute as a whole, it must be interpreted to authorize official time only for those union negotiators who are members of the bargaining unit for which the agreement is sought.

Commenting that neither the language of section 7131(a) nor the act's legislative history definitely addressed this issue, the Authority reached its conclusion on the basis of consistency with other provisions of the law. All these related provisions, the Authority said, link rights and duties to appropriate bargaining units only. The Authority also referred to its earlier decisions holding that the scope of bargaining does not extend to working conditions affecting employees outside the unit.

The Authority ruled that consistent with the overall scheme of the statute, official time entitlement "accrues only to an employee, serving as a representative of an exclusive representative, who is a member of the bargaining unit to which the right to negotiate the bargaining agreement applies." *(7 FLRA No. 118—January 22, 1982)*

New Presidential Order Excludes More Security Units from Program

President Ronald Reagan signed Executive Order 12338 entitled "Exclusions from the Federal Service Labor-Management Relations Program" on January 11. The new order amends E.O. 12171 by exempting from the program 23 subdivisions of the Department of Defense. It also reflects organizational changes in the Department of Energy.

The affected DOD entities have as a primary function intelligence, counterintelligence, investigative or national security work. The Federal Service Labor-Management Relations Statute provides for Presidential exclusion of agencies or subdivisions for national security reasons.

The order appears in the *Federal Register* of January 13, 1982.

Authority Issues Major Policy Decision on Official Time for Local Bargaining

Payment of official time for negotiation of a local agreement supplementing a master contract is not a statutory union right, the Federal Labor Relations Authority ruled in a major policy decision. The parties may, however, bargain on the authorization of official time for hours spent by union representatives negotiating such a local agreement.

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Baby, It's Cold Outside

Casefacts: It was an extremely cold February day at the Norfolk Naval Shipyard, and the crane operator built a fire to keep warm. Then, seeing smoke coming from the crane, a foreman climbed up to investigate. The crane operator explained he was burning some material in a can, but that he had secured the fire and there was a fire extinguisher nearby.

Management requested a pre-action investigation and obtained an investigator from outside the operator's shop. It did so because of alleged ill-feeling between the operator (who was a shop steward) and his immediate supervisor.

At the conclusion of the investigation, management gave the operator a two day suspension, overriding his immediate supervisor's recommendation of five days. The crane operator grieved, and the Federal Employees Metal Trades Council took the case to arbitration.

Contrary to the grievant's assertion that there had been very few shop conferences on safety—and none dealing with making fires in cans—management stated that there had been periodic safety conferences. And even if the specific matter of making fires on cranes was not discussed, the grievant's common sense should have told him this was prohibited conduct which endangered life and property.

The shipyard stressed that as a steward the grievant had the additional responsibility of knowing the rules, and he was expected to follow them to set a good example for fellow employees. The parties' agreement itself gives stewards the responsibility to observe unsafe conditions and to report and correct them.

Supervisors testified that workers were not authorized to make fires in cranes even in cold weather. They were expected to keep warm by wearing heavy clothes, not by building fires.

The shipyard contended that the two day suspension was within prescribed guidelines for a first offense. It believed the grievant's impermissible and unsafe conduct to be intentional, and therefore the suspension was reasonable discipline calculated to correct errant behavior. It denied penalizing the grievant because he was a union steward or because of bad feeling between him and his supervisor.

The union had two arguments. First, that any discipline was unreasonable, and second, that the amount assessed violated the basic principles of discipline. Discipline for first offenses was usually a reprimand, which should have been the penalty imposed in this case.

The grievant was given no forewarning of possible disciplinary consequences of his conduct. The employer had not proved that the rule involved was reasonably related to the safe operation of work.

To avoid frostbite in freezing weather, the grievant had made a fire in a metal can with a cover. According to the union, he did nothing clandestinely. The evidence showed that other journeymen had also made fires on cranes under similar conditions. Further, it would have been dangerous for the operator to climb 52 feet down to the ground with hands too cold to grasp the bars.

Issue: Was the grievant disciplined for just cause?

Award: Arbitrator Jacob Seidenberg reduced the penalty to a written reprimand, finding the two day suspension unreasonable in light of all the facts and circumstances.

"Obviously it was an error for the grievant to make a fire anywhere on the crane, be it on the boom or the compartment. It was an error to do so, regardless of whether the grievant had or had not been instructed about making fires on the crane. The grievant's common sense and native intelligence should have informed him that this was not a prudent course of conduct to follow."

The arbitrator found sufficient mitigating factors which made the penalty too severe. It had been an extremely cold day, and the grievant was forced to take measures to prevent suffering from extreme cold. His conduct, albeit imprudent, was not wilful and not without some justification. It was a first offense. The arbitrator also found some proof that the immediate supervisor was not kindly disposed toward the grievant.

"In light of all the facts," Arbitrator Seidenberg concluded, "and because discipline is intended to be corrective rather than punitive, the appropriate discipline would have been a written reprimand noting the potential danger of making fires in such locations, and cautioning the grievant not ever again to engage in such inappropriate conduct."

Since the grievant damaged no property or himself, since he had some basis to make the fire, and since there was no evidence of any wilful or deliberate intent to flaunt safety rules, the arbitrator believed a written reprimand to be a more appropriate sanction.

While the employer can properly discipline, the arbitrator concluded, the discipline must bear a reasonable relationship to the offense, and be corrective and remedial in nature rather than punitive and excessive. *(Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council—June 24, 1981. LAIRS #135-56)*

The Labor-Management
FORUM

Moffett Appointed FMCS Director

Kenneth E. Moffett has been sworn in as national director of the Federal Mediation and Conciliation Service. Moffett had served as the Service's acting director since January 1, 1981. As the nation's chief Federal mediator, he gained prominence in labor circles last year for his handling of the baseball strike and the contract talks involving air traffic controllers. Moffett was commissioned a mediator with FMCS in 1961.

Let's Go Half and Half

A contract provision allowing the union president to spend up to 50 percent of his time in representational duties was the remedy fashioned by the factfinder to resolve a bargaining dispute between the Marine Corps, Quantico, Virginia and Local 1786, AFGE. Dismissing union objections to the factfinder's recommendation, the Federal Service Impasses Panel ordered the parties to adopt it. The union had argued that the imposition of a cap on official time encroached upon internal union affairs.

Both sides had offered "reasonable" time—defined by management as 40 percent of the president's monthly work schedule and by the union as up to 75 percent, with leave without pay for time over that.

The employer contended that the AFGE official was spending too much time at first level grievances. This involvement was more a matter of choice than necessity since the union had designated only 16 stewards rather than the 32 allowed by contract. Moreover, the new agreement would improve the steward system by increasing union-sponsored steward training from 8 to 20 hours per steward per year, and an additional 20 hours for new stewards. This would enable the president to spend less time on grievances.

The union rebutted that the grievances were too complex to be handled by other representatives, and some work areas were without stewards. Stewards were intimidated by high level management personnel, and the employer was trying to force the union to rely on inexperienced and unqualified persons to represent AFGE. Lastly, the local charged, the Corps was seeking to intrude upon a matter of internal union business—its choice of representatives.

The Panel accepted its factfinder's finding that the record did not support either party's proposal, and that the proper resolution of the dispute fell somewhere between the two, in the vicinity of 50 percent official time.

The Panel found no basis for AFGE's argument that the recommendation constituted improper interference in union affairs. "Indeed, the union clearly retains the right to choose its own officers and stewards, and assign them appropriate duties." *(Case No. 81 FSIP 99, December 23, 1981)*

Medical Center

Finding the medical interns, residents and fellows assigned to the Veterans Administration Medical Center and paid by the VA to be an appropriate unit, the Federal Labor Relations Authority has directed that a secret ballot election be conducted at the Long Beach, California activity. The Authority noted that although its ruling differs from that of the National Labor Relations Board, it does not consider the NLRB ruling dispositive under the Federal Service Labor-Management Relations Statute.

(The NLRB had found that housestaffs of private, nonprofit hospitals are primarily students and thus not appropriate bargaining units.)

The individuals in the VA case, who are physicians pursuing graduate medical training, spend the bulk of their time in direct patient care activities. Their salaries are determined by the VA. Their period of service is credited toward Civil Service retirement, and they are eligible for Federal employee health insurance plans.

The legislative history of the statute specifically mentions the Physicians National Housestaff Association (the union in the case) as a professional association eligible for representational rights as a union.

The status of the VA housestaff as graduate medical students or trainees was uncontroverted. In the Authority's view, however, an employer-employee relationship exists—notwithstanding the fact that the purpose of the employment is educational. An apprentice is no less an employee simply because the primary purpose of the employment is to learn a craft, trade or profession, the Authority said.

For these and other reasons, the Authority ruled that the housestaff at the California center paid by the VA are employees of the activity within the meaning of the statute. *(7 FLRA No. 66—December 29, 1981)*

FSIP Moves to New D.C. Address, FLRA Relocates Regional Office

The Federal Service Impasses Panel has announced that effective February 15, its national office address will be 500 C St. S.W., Washington, D.C. 20424, Telephone: FTS 382-0981; Commercial 202/382-0981.

The Federal Labor Relations Authority has relocated its Kansas City, Missouri Region 7 headquarters. The address of Region 7 is now 1531 Stout St., Suite 301, Denver, Colorado 80202, Telephone: FTS 327-5224; Commercial 303/837-5224.

Bench Marks

No Constitutional Right to Post Union Posters

A Federal appeals court has upheld the Veterans Administration's rule which restricts the posting of union material to the union bulletin board. Local 1557 of the American Federation of Government Employees had contended that the restriction violated members' right to expression under the First Amendment.

The incident occurred in May 1978 when the local distributed posters to over 50 employees at VA's regional office in Denver, Colorado. The large posters, 11" by 17", showed a caricature of President Carter and announced AFGE's intention to protest a pay cap on Federal salary increases. Employees displayed the posters on walls, room dividers and filing cabinets. Management ordered the posters removed because of violation of government regulations and the parties' agreement.

Although regulations prohibit the posting of material in government buildings, an exception allows posting on union bulletin boards. Local 1557 had a bulletin board, as called for by the contract. The union placed a copy of the poster on the board, and it remained there.

The tenth circuit court of appeals, citing other decisions, found that the VA restriction had nothing to do with the subject matter content of the poster but rather with the place of posting, and that the First Amendment does not guarantee the right of expression at anyplace a person may choose.

"The restriction on place of posting was agreed with the union, was reasonably necessary to further substantial and legitimate government interest in assuring an area for productive work, and had minimal effect, if any, on the expression of ideas," the court said. So holding, the court dismissed AFGE's suit. *(USCA Tenth Circuit No. 80-1534, December 1, 1981)*

(continued from page 1)

The Authority held that the entitlement to official time does not encompass negotiations below the level of exclusive recognition which are designed to create local agreements to supplement a national or controlling (master) agreement. That is, the right of official time flows only to employees representing the exclusive union in an appropriate unit and not to negotiations below the level of exclusive recognition.

The official time provisions of section 7131(a) apply to negotiations at the controlling level of recognition, including negotiation of local issues as part of the master agreement. The Authority emphasized that the parties are empowered by section 7131(d) to negotiate official time for employees representing the exclusive representative at the local level in any amount the parties agree to be "reasonable, necessary and in the public interest." *(7 FLRA No. 105—January 15, 1982)*

Arbitration Award Modified

An arbitration award ordering retroactive promotion and back pay has been modified by the Federal Labor Relations Authority. The arbitrator had not found that *but for* management's failure to properly institute a career ladder program, the grievant would have been promoted in 1979, the Authority concluded.

It all began when the Social Security Administration denied a career ladder promotion on the basis of deficiencies in the grievant's work performance. Arbitrator Martin E. Conway ruled that the activity failed to make a reasonable and substantial effort to institute parts of the program. Further, the evidence on the grievant's productivity did not clearly demonstrate that she was not entitled to a promotion.

The Authority observed that the Back Pay Act authorizes retroactive promotion and pay only when an employee suffers an unjustified or unwarranted personnel action, and this action directly results in the denial of a promotion that an aggrieved employee would otherwise receive.

In this case, the evidence as set forth by the arbitrator indicates that in any event management would not have promoted the grievant because of her deficiencies in timeliness, planning, setting priorities, etc. Since the arbitrator had not made the necessary findings, the Authority struck from the award the entitlement to retroactive promotion and back pay. *(7 FLRA No. 97—January 15, 1982)*

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Do Make a Federal Case Out of It

Finding that it lacked jurisdiction, the Federal Labor Relations Authority dismissed a union's exceptions to an arbitration award upholding the Veterans Administration's dismissal of an employee for absence without leave. Review of an arbitration award relating to adverse actions must be through judicial review, the Authority said, in the same way as if the matter had been decided by the Merit Systems Protection Board.

The review of Arbitrator William W. Waite's award was sought by Local 2094 of the American Federation of Government Employees. According to the Authority's holding, the union must now seek examination by a Federal court, pursuant to 5 USC 7703. *(7 FLRA No. 134—January 29, 1982)*

Washing One's Dirty Linen

Even though the past practice of letting some employees use the activity's laundry and dry cleaning plant for personal clothing was possibly illegal, management erred by unilaterally discontinuing the practice. The Marine Corps should have given the union prior notice, the Federal Labor Relations Authority's administrative law judge ruled, and offered it an opportunity to negotiate on the impact and implementation of the discontinuance.

Since 1975 workers at the plant were allowed to send their clothing through the laundry along with that of paying customers. Under this "self help lot" practice, employees' clothes were cleaned and pressed as time permitted.

The employer argued that the "self help lot" was not a past practice, and not accomplished with management's knowledge and permission. Moreover, a return to the former custom was not in order because law and regulation prohibit use of government property "for other than officially approved activities."

The ALJ concluded that this was indeed an established practice known and at least implicitly condoned by management. Daily production records showed that supervisors as well as employees sent clothing. Even assuming that the practice was illegal and must be remedied in any final solution, such illegality was insufficient defense for the employer's unilateral action.

The ALJ accordingly found the activity guilty of an unfair labor practice. He ordered it to reinstate the "self help lot" and bargain with the union on the intended discontinuance. Since no exceptions were filed to his decision, it became the decision of the Authority. *(Case No. 3 CA-2379, January 29, 1982)*

Discipline of Supervisors Is Held Not Negotiable

Discipline and rating of supervisors are not a proper union concern, the Federal Labor Relations Authority ruled, and consequently not within the scope of bargaining. The union had proposed that management take into consideration its recommendations regarding punitive and remedial actions for supervisors who violated employee rights. The union also proposed that employees rate their supervisors, and that management consider the ratings in such matters as remedial training, discipline and promotion.

The proposals were found not to relate directly to employment conditions of workers represented by Local R7-23, NAGE. Instead they relate to matters affecting management and supervisors at Scott Air Force Base, Illinois who are not in the bargaining unit. The proposals go beyond NAGE's representation rights, and the Base has no obligation to negotiate. *(7 FLRA Nos. 110 and 117—January 22, 1982)*

Parking Proposals Partly Prohibited

A union's attempt to negotiate the right to discuss penalties imposed by the carpooling committee before the penalties are imposed is negotiable the Federal Labor Relations Authority rules. The Authority found that the proposal does not limit penalties which management may impose nor does it prevent management from disciplining employees.

The Authority found nonnegotiable three other carpooling proposals by the National Treasury Employees Union to the Internal Revenue Service's office in Atlanta, Georgia. The three provide that reserved parking be allocated on the basis of one criterion—the EPA mileage rating of the automobile involved. These conflict with government-wide regulations regarding parking for the handicapped, executives, vanpools, etc.

A fifth NTEU proposal was not in the proper forum,

(Continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide [illegible] training in the art and practice of grievance handling and arbitration.

It's Tax Time Again

Casefacts: In April 1979 the file clerk at the Internal Revenue Service dutifully filed her Federal tax return for the previous year—but failed to include $96.54 owed for excess tax liability. After receiving three delinquency notices, she agreed in August to pay by installment. That fall she paid all the money owed for 1978.

Almost a year later the clerk's supervisor gave her an official letter of reprimand because of her failure to pay the 1978 tax in a timely manner. The National Treasury Employees Union took her case to arbitration.

The grievant, a GS 3, had worked for IRS for six years. Her duties included typing letters and assigning and updating cases.

This was not the first time she had been delinquent in paying taxes; she had failed to enclose payment for an excess tax liability on her 1976 taxes. In that instance, rather than waiting for a delinquency notice, she had gone on her own initiative to the collection division to work out arrangements to pay.

In September 1979 the clerk's supervisor orally admonished her for the late payment of the 1976 tax, and discussed the obligation of IRS employees to timely pay any valid tax due, as set forth in the IRS employee handbook. The supervisor pointed out that prior to each tax filing season IRS employees receive a memorandum reminding them of their obligation. The clerk did not tell the supervisor that she had failed to timely pay her 1978 taxes and was then paying by installment.

It was not until June 1980 that management was notified of the grievant's 1978 delinquency. Management promptly counselled her and in July issued the letter of reprimand. The grievant submitted a written statement that her fuel bills had been exceedingly high, that she was the sole support for a family of three, and that she had readjusted her dependent status for withholding to prevent the problem from recurring.

The NTEU contended that the disciplinary action was imposed so long after the alleged misconduct as to render it unfair and have no effect on the efficiency of the Service. Further, a written reprimand was not appropriate in light of the grievant's good faith efforts.

The grievant's job, NTEU argued, required no tax knowledge and no contact with the taxpaying public. Since the Service failed to present any evidence of public awareness of her late payment, it had not established the necessary link between the offense committed and the efficiency of the Service, as required by the parties' contract.

The IRS took the position that the reprimand was issued as soon as possible following receipt of the delinquency report. And while management was aware of the grievant's financial difficulties, employees were expected to contact supervisors and make appropriate arrangements, and the grievant had not done so. Moreover, this was not a first time offense.

The employer emphasized that its mission is to encourage and achieve the highest possible degree of voluntary compliance with tax laws. To that end, IRS attempts to maintain a high degree of public confidence in its integrity and efficiency. It puts employees on notice of their responsibility through the handbook and the annual memo.

Issue: Was the letter of reprimand appropriate discipline, and did it promote the efficiency of the Service?

Award: Arbitrator Herbert Fishgold denied the grievance, finding that IRS met its burden of establishing that the reprimand was reasonable and promoted the efficiency of the Service.

He noted that both parties had cited court rulings and arbitration awards concerning the issue of discipline imposed on IRS employees for the late payment of taxes. The decisions establish the rationale that if it became known that IRS tolerated the failure of some of its own employees to pay their taxes on time, this could have a serious effect on the Service's capacity to retain the voluntary cooperation of the substantial majority of the citizens in making the prompt payment it now enjoys.

Such a rationale, based on the reasonably forseeable consequences flowing from opening the door to widespread abuse among IRS employees, is as applicable to a low level clerk having no contact with the public as it is to a management official, since the taxpaying public generally perceives all IRS employees to be the same.

Regarding the union's arguments on the delayed discipline, the arbitrator judged that management had acted as soon as it was notified of the delinquency.

Arbitrator Fishgold concluded that in imposing the penalty, IRS had taken into account both the clerk's financial situation and the fact that it was a second offense. There was no question but that the grievant was aware of her obligation to pay taxes when due, and of the Service's view of the seriousness of a failure to do so. *(Internal Revenue Service and National Treasury Employees Union Chapter 86—January 6, 1982. LAIRS 13875)*

1982 Convention Calendar

Many of the organizations with exclusive bargaining rights in Federal agencies will be holding a national convention this year. Following is a chronology of conventions scheduled for the remainder of 1982, excluding postal organizations. AFL-CIO affiliates appear in italics; all others are independent.

March

15 *National Marine Engineers' Beneficial Association*
New Orleans, Louisiana

17 Association of Civilian Technicians
Washington, D.C.

29 National Association of Agriculture Employees
New Orleans, Louisiana

June

2 *Professional Airways Systems Specialists*
Minneapolis, Minnesota

21 *American Federation of State, County and Municipal Employees*
Atlantic City, New Jersey

25 American Nurses' Association
Washington, D.C.

27 National Association of Planners-Estimators and Progressmen
Reno, Nevada

July

1 *American Federation of Teachers*
New York, New York

1 National Education Association
Los Angeles, California

August

2 *International Association of Fire Fighters*
Chicago, Illinois

2 *International Typographical Union*
Seattle, Washington

9 *International Federation of Professional and Technical Engineers*
Seattle, Washington

23 *American Federation of Government Employees*
New York, New York

September

13 *International Brotherhood of Electrical Workers*
Los Angeles, California

20 National Federation of Federal Employees
Chicago, Illinois

October

14 National Weather Service Employees' Association
San Antonio, Texas

CG Waives Union Payment in Dues Recoupment Case

The U.S. Comptroller General has waived the dues repayment by a union to an Army installation which had erroneously withheld dues of three employees promoted out of the unit and had transmitted the money to the union. The record showed that the National Federation of Federal Employees was not at fault in receiving these dues, the CG said.

The Army had failed to terminate the dues allotments when the employees left the unit. Discovering its error several years later, the activity refunded $1,063.50 to the three employees. It also withheld the money from amounts due the union.

NFFE requested a waiver of the repayment. It contended that since it did not know who among its members were supervisors, it was not aware that it had received erroneously withheld dues. Further, it had provided services to these employees during the period in question.

The CG concluded that the employer had the sole responsibility for terminating allotments for ineligible employees. The erroneous payments were made through administrative error on the Army's part and were received by NFFE in good faith and without fraud or misrepresentation. The collection from the union was accordingly waived under 5 USC 5584. *(Comptroller General Decision B-201817, January 27, 1982)*

The Federal Service Impasses
[illegible]

The Federal Service Impasses Panel has issued orders in eight of nine bargaining deadlocks recently before it. One order was issued as a result of a factfinding hearing. Seven others were based on written submissions from the parties. In the ninth case the dispute was resolved when the parties accepted the factfinder's recommendations.

With the factfinder's assistance during the hearing, the parties voluntarily resolved several issues. Then the Panel directed Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees Council 214 to adopt the employer's proposals, as amended, on official time for union representatives, and negotiations during the life of the agreement. FSIP told them to accept the AFGE proposal on repromotion of downgraded workers. *(Case No. 81 FSIP 53, November 20, 1981)*

The Army Aberdeen Proving Ground, Maryland and International Association of Machinists Lodge 2424 approved the factfinder's compromise language on official time for end-of-contract, mid-term, and impact bargaining. *(Case No. 81 FSIP 89, November 18, 1981)*

Three Panel orders applied to the National Guard:

- The Oklahoma NG and the National Federation of Federal Employees Local 1694 must accept the union's proposal on the wearing of street clothing, and negotiate occasions on which the military uniform might be required. *(Case No. 81 FSIP November 3, 1981)*
- The parties must adopt the employer's proposals on performance evaluation—Maine NG and AFGE Locals 3012 and 3013. *(Case No. 81 FSIP 173, January 7, 1982)*
- The Louisiana NG and NFFE Locals 1707, 1708 and 1737 were ordered to adopt the union's proposals on grooming standards. The Guard must withdraw its proposals regarding circumstances for which uniforms could be required. *(Case No. 81 FSIP 147, January 8, 1982)*

Telling the parties to accept the employer's proposal for the negotiation schedule, the Panel settled an impasse between the Veterans Administration Medical Center, Miami, Florida and NFFE Local 1453. *(Case No. 81 FSIP 131, October 21, 1981)*

The Panel directed that the hours proposal of Treasury's Bureau of Engraving and Printing be adopted by the employer and IAM Lodge 2135, Washington, D.C. *(Case No. 81 FSIP 137, October 21, 1981)*

The dispute between Treasury's Bureau of Alcohol, Tobacco and Firearms and the National Treasury Employees Union centered on procedures for employee participation in the development of performance standards. The parties were ordered to adopt the Bureau's proposal. *(Case No. 81 FSIP 134, October 23, 1981)*

Having considered a performance appraisals controversy between Fort Leonard Wood, Missouri and NFFE Local 738, FSIP ordered adoption of the activity's proposal. *(Case No. 81 FSIP 150, October 28, 1981)*

(Continued from page 1)

the Authority said. This called for IRS to make a good faith effort to find alternative work for carpoolers who would otherwise be sent home early for lack of work. The Authority viewed this not as a negotiability issue, but as a matter which should be pursued through the unfair labor practice procedure to resolve the dispute over whether the proposal is related to the carpool project. *(8 FLRA No. 8—January 4, 1982)*

On the Wrong Track

By petitioning for enforcement of a Federal Labor Relations Authority decision upholding an arbitration award, the union used the wrong procedure to obtain employer compliance with the award, the Authority said. The appropriate procedure is for the Social Security Administration Council, AFGE to bring unfair labor practice charges against SSA's San Francisco regional office. So finding, the Authority dismissed the union's petition.

The original case, *5 FLRA No. 100,* involved an award of back pay and retroactive promotion to the grievant. The Authority had dismissed SSA's claim that the award was inconsistent with the Back Pay Act. The agency did not raise the issue of whether the retroactive promotion violated Federal Personnel Manual regulations.

The Authority noted that ULP proceedings, which provide for investigations, are particularly suitable for making the determinations of factual issues as presented in compliance disputes. *(Case No. O-AR-123—January 15, 1982)*

AFGE Proposal Held Nonnegotiable

The union lost its bid to bargain over a proposal requiring the Navy Supply Center, Oakland to repromote employees after a RIF, in retention order as vacancies occur. The Federal Labor Relations Authority concluded that this proposal by Local 1533, AFGE directly interferes with management's right to select. *(8 FLRA No. 6, February 4, 1982)*

Consultant

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The Federal Labor-Management

Consultant

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MAR 2

New Developments Checklist

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New Impasses Panel Chairman

Robert G. Howlett has been appointed member and chairman of the Federal Service Impasses Panel by President Reagan. He succeeds Howard G. Gamser whose resignation as member and chairman of the Panel was accepted by the President last month. Howlett, who was sworn in on February 16, will fill the remainder of Gamser's term which expires January 10, 1984. With his appointment, three Panel vacancies are still unfilled.

A prominent labor arbitrator, Howlett served as chairman of the Panel from 1976 through 1978 and was previously a member of the Michigan Employment Relations Commission. In April 1981 he was selected as public member and designated chairman of the Foreign Service Impasse Disputes Panel. He has been a partner in a private law firm in Grand Rapids, Michigan since 1949.

PATCO Update

The U.S. Court of Appeals (D.C. Circuit) has ordered a special hearing to determine the nature, extent, source and effect of any and all *ex parte* contacts and other approaches that have been made to any member or members of the Federal Labor Relations Authority while the appeal from the decision of Administrative Law Judge Fenton decertifying the Professional Air Traffic Controllers Organization was pending before them.

The court reported that documents submitted to it indicate that a member of the FLRA may have been involved in an improper *ex parte* contact while the Authority was deliberating the merits of an unfair labor practice complaint against PATCO in connection with the 1981 air controllers strike.

The court will delay its final decision in the case until it receives and evaluates the record and recommendations transmitted by the specially-designated administrative law judge appointed through the auspices of the Office of Personnel Management.

SSA-AFGE Conclude Negotiations

Negotiations between the Social Security Administration and the American Federation of Government Employees have culminated in an agreement after 18 months of bargaining. The agreement, which covers the consolidated national unit of 67,000 employees, was negotiated with the assistance of Mediator-Arbitrator Jerome Ross, appointed by the Federal Service Impasses Panel.

Negotiations between the parties began in June of 1980, and continued until May of 1981. In May, mediators certified that the parties were at an impasse, and in June, AFGE submitted a request to the Panel for assistance. Correspondence between the parties and the FSIP continued through September, when the Panel determined that the impasse should be resolved through an arbitrator. The arbitrator was given the authority to mediate with respect to all open issues, including those about which negotiability questions had been raised. The arbitrator was also given the authority to dispose of issues by issuing binding decisions. The Federal Mediation and Conciliation Service supplied the parties a listing of arbitrators from which Mr. Ross was selected.

Sessions began again under his auspices in mid-October. Over 30 contract articles were in dispute in such areas as official time, merit promotion, and performance appraisal. In late December agreement was reached, with some specific language remaining to be worked out.

Authority's Regional Director Finds No ULP in Agency's Initiation of Performance Rating Plan

In an action related to the SSA-AFGE negotiations, the Washington Regional Director of the FLRA rejected AFGE's unfair labor practice charge against SSA for implementing a performance appraisal system on which the parties had reached impasse, while the issue was pending before the FSIP.

The parties began bargaining on the performance appraisal system mandated by 5 USC 4302 in April 1980, until impasse was reached in July 1981. The union invoked the Panel's help in August, and the SSA advised AFGE that it intended to implement management's last best final offer on October 1, 1981 due to the statutory requirement. The agency had previously advised the union of the October 1 implementation date on various occasions during the year.

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Framed?

Casefacts: The security police of Hill Air Force Base, Utah were notified by an informer that a supervisor would attempt to take government property off the base in his pick-up truck at the end of his shift. The police stopped the supervisor and searched his truck as he was attempting to leave. They found a gallon can of enamel, an air-craft clock, two cans of auto polish and other government property valued at over $400 in the back of the truck.

The police confiscated the government property, but the supervisor denied any knowledge of how it came to be in his vehicle. After an intensive investigation, including a polygraph examination which indicated the supervisor was telling the truth, the agency exonerated him of any guilt in the matter, and concluded that someone else had planted the government property in his truck to frame him.

The agency determined that the supervisor had been set up by an employee whom he supervised. The supervisor had earlier reprimanded the employee for drinking on duty. Management suspended the employee for 14 days for placing the property in his supervisor's truck, and for making a false statement to the security police that the supervisor was going to steal the property. The employee grieved the discipline. Denied at lower levels, the case went to arbitration.

The agency based its determination of the employee's guilt on written statements the police had obtained from other employees. One employee's statement indicated that the grievant had told her that he and two other employees had been caught drinking on duty and that he was going to "burn" the supervisor.

Statements from two guards held that the grievant had informed them that the supervisor would be taking government property off the base at the end of the shift. Both statements said that the grievant told them that the supervisor had told employees that he was using paint and other government items in his home. The grievant also told the guards that the supervisor had said that if he were caught, he would claim someone else planted the materials.

The last statement had been obtained from a co-worker of the grievant. His statement indicated that the grievant had told him that he and other employees had put government property in the supervisor's truck so the supervisor would be "busted" by the security police.

At the arbitration hearing only one of the employees who made the written statements testified. (The woman and the two security guards had left the agency since the statements were taken.) The male co-worker repudiated his written statement. He said that management had subjected him to intense pressure, threatening to "have his job" if he did not sign the written statement. He wanted to get the agency "off his back" by telling them what they wanted to hear.

The American Federation of Government Employees argued that the first three written statements were nothing more than uncorroborated hearsay evidence because they were not sworn to by the people who made them. Consequently, the three statements should not be allowed as evidence since the people who made them were not produced as witnesses by management, thus denying the union a chance to cross-examine. The union also contended that the repudiation by the male co-worker of his written statement supported AFGE's position that the suspension was without merit.

Issue: Did management have cause to suspend the grievant for 14 days for allegedly placing government property in his supervisor's truck in an attempt to have the supervisor arrested?

Award: Arbitrator A. J. Wann found that the agency did not have cause to suspend the grievant. The grievant's guilt was not clearly established by testimony and evidence. The arbitrator ruled that the unsworn statements introduced by management could not be given the weight or value of testimony taken under oath at the arbitration hearing, where witnesses would be available for further elaboration and examination.

Contradictions between the co-worker's statement and his sworn testimony at the hearing left the arbitrator with very serious doubts as to whether any of his testimony could be believed. These contradictions, Arbitrator Wann held, significantly weakened the agency's case which was highly dependent on the employee's written statement.

The arbitrator noted that it appeared somewhat peculiar that the agency took disciplinary action only against the grievant, when the written statements indicated that other employees as well as the grievant were allegedly involved in setting-up the supervisor.

Finding that the charges against the grievant had not been proved beyond a reasonable doubt by a preponderance of evidence, Arbitrator Wann ordered that the grievant be made whole. *(Department of Air Force, Headquarters 2849th Air Base Group, Hill Air Force Base, Utah and American Federation of Government Employees Local 1592—January 27, 1982. LAIRS #13918).*

The Labor-Management
FORUM

3 FLMC 82-5 March 12, 1982

NTEU Proposals to IRS Are Bargainable

Twelve union proposals concerning the advice to be given employees prior to an investigatory interview which might result in disciplinary action against them were held negotiable by the Federal Labor Relations Authority. Contrary to allegations by the Internal Revenue Service, the Authority found that the manner in which bargaining unit employees are to be notified of certain procedures, privileges and obligations prior to interrogation is a condition of employement.

In addition, FLRA ruled that the proposals constitute negotiable procedures to ensure that an employee who is about to be interrogated is notified of the circumstances under which questioning will occur.

The Authority found no support for the agency's assertation that the National Treasury Employee Union's proposals would interfere with management's statutory right to determine internal security practices. The Authority further concluded that there was no showing of inconsistency between the union proposals and an attorney general's memorandum dated June 4, 1980. *(8 FLRA No. 27—February 11,1982)*

Promotion Award Modified

An arbitration award which ordered the Picatinny Army Arsenal, Dover, New Jersey, to repromote the grievant to his former grade for its failure to give the grievant special consideration in promotion actions has been modified by the Federal Labor Relations Authority.

The grievant, a GS-12 engineer, was eligible for repromotion to a GS-13 position. Over a period of three years, the grievant was denied repromotion to approximately 80 positions. A grievance was filed and ultimately the grievant's non-selection for three of these positions was submitted to arbitration by Local 1437 of the National Federation of Federal Employees.

Arbitrator Ogden W. Fields ruled that management violated the agreement by not giving the grievant the special consideration to which he was entitled, and by not furnishing him persuasive reasons for his nonselection. As corrective action the arbitrator ordered the grievant to be immediately restored to his former grade and be given backpay, retroactive to one of the nonselection dates. The award also directed management to continue him at the GS-13 level until he was assigned a position graded at GS-13.

The Arsenal filed an appeal to the Authority, contending that the award was deficient because it was contrary to law. The FLRA found that the award violated the Back Pay Act, and modified it.

Under the terms of the Back Pay Act, an award of retroactive promotion and backpay is only available when an employee would have received the promotion had the employee not suffered an unjustified or unwarranted personnel action. The Authority noted that the arbitrator failed to find that the grievant *would* have been repromoted; rather, he felt that had the grievant received the proper consideration to which he was entitled, the grievant *should* have been promoted. Due to the arbitrator's failure to expressly make the findings requisite for a proper order of backpay, the FLRA found the award deficient. However, the Authority only modified the award since the arbitrator found that the activity had violated the agreement by its failure to give the grievant either the special selection consideration or provide persuasive reasons for his nonselections.

The modified award provides that the grievant will be selected for the next GS-13 position for which he applies and is qualified, unless the failure to select the grievant can be properly justified in accordance with applicable law, rule, or regulation or the collective bargaining agreement. The activity must also provide him with the specific reasons for nonselection if he is not selected. *(7 FLRA No. 109—January 18, 1982)*

You're in the Wrong Forum, Authority Tells Union

The Federal Labor Relations Authority turned down a request by Local 1603, AFGE for enforcement of a Federal Service Impasses Panel order because the law does not provide for direct appeals from Panel decisions to the Authority. The proper course to ensure FLRA review was for the union to file an unfair labor practice charge against the Naval Air Station, Patuxent River, Maryland. *(8 FLRA No. 29—February 11, 1982)*

AFGE alleged that the Navy refused to comply with a Panel order directing the parties to adopt the union's proposal on environmental pay.

The Welcome Mat's Not Out

Management may unilaterally restrict access to its premises by nonemployee union representatives performing internal union business. This ruling by the Office of the General Counsel of the Federal Labor Relations Authority supported the Social Security Administration's refusal to bargain on the issue.

The National Council of SSA Field Operations Locals, AFGE had wanted to negotiate on conditions under which its national representatives would be permitted access to nonwork areas during nonduty hours. The General Counsel pointed out that the activity's limitation expressly applies only to representatives engaged in internal union business rather than to representational matters. *(Case No. 7 CA-1182—December 30, 1981)*

(continued from page 1)

On October 1, the agency unilaterally implemented its last best offer, while the impasse was before the Panel. AFGE's ULP charge was rejected by the Regional Director on the basis that the statutorily mandated implementation date constituted an overriding exigency which permitted unilateral implementation of SSA's final best offer. The RD noted that the SSA had given AFGE sufficient notice of its intent to implement its offer, and had bargained in good faith to impasse. AFGE may appeal the RD's decision to the Office of the General Counsel of the FLRA. *(Case 3 CA-2909, January 13, 1982.)*

A Hunting We Will Go: Second Verse

An arbitration award, in which Arbitrator Ronald L. Wiggins ruled that a past practice which permitted employees to grow beards during the deer hunting season could not be enforced, was overturned by the Federal Labor Relations Authority.

In the award, the arbitrator ruled that a past practice existed between the Utah Army National Guard and Local 1724 of the National Federation of Federal Employees. (See the *Consultant*, September 26, 1980, 2 FLMC 80-19). However, he determined that unlike the private sector, the existence of a past practice in the Federal sector does not always require that the parties observe the practice in the same manner that they are required to observe written provisions of the agreement.

His decision to deny the grievance was based on the employment requirement that the employees become and remain members of the National Guard in a military capacity. He held that, despite the establishment of a past practice, the technicians were subject to military regulations which did not permit them to grow beards. Thus, he denied the grievance by refusing to grant the remedy requested by NFFE that the technicians be permitted to grow beards while in civilian status.

NFFE filed an exception to the award, arguing that it was deficient because it was contrary to case law on the issue of past practice. The FLRA agreed and set aside the award.

The Authority cited previous decisions *(5 FLRA No. 35* and *5 FLRA No. 100)* in which it held that in the Federal sector, as in the private sector, "the practices of the industry and the shop [are] equally part of the collective bargaining agreement although not expressed in it." The FLRA determined that when the National Guard technicians are performing their duties in their civilian employee capacity, they are covered by the provisions of the statute, including provisions relating to conditions of employment. Consequently, the FLRA found the award deficient under the statute, since it denied the grievance which sought enforcement of the established past practice while the technicians are serving in their civilian capacity. *(7 FLRA No. 125—January 28, 1982)*

And I'll Have a Hat When I Leave

Three proposals forwarded by the National Treasury Employees Union have been found nonnegotiable by the Federal Labor Relations Authority. The proposals arose in negotiations with the U.S. Customs Service.

The first union proposal would have permitted uniformed Customs employees to remove their hats when performing vehicle inspections. The Authority ruled the proposal concerned the means of performing work and was nonnegotiable. The FLRA said that the wearing of the hat promotes the purpose of the law enforcement uniform, which enables the public to readily identify the wearer as a representative of the government.

The second proposal would have prevented management from disclosing the employee's identity without his consent to a member of the public complaining about the employee's conduct. This proposal was found nonnegotiable since it also dealt with the means of performing work. The Authority determined that the public's ability to identify Customs employees with whom they are dealing by asking their names, furthers courteous treatment and the performance of the agency's work.

The last proposal would have granted employees the right to choose either the negotiated grievance procedure or a statutory procedure with respect to any matter covered by the grievance procedure. The FLRA, relying upon its decision in *5 FLRA No. 86*, found the proposal nonnegotiable since it was inconsistent with section 7121(a)(1) of the statute, which makes the negotiated procedure the exclusive procedure for all covered grievances except adverse actions, removal or reduction in grade based on unacceptable performance and discrimination complaints. *(8 FLRA No. 1—February 4, 1982)*

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NTEU wins right to see sanitized SES self-appraisals . . . p. 3

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Bookshelf . . . p. 4

Cold Cuts

Six proposals made by the Meat Graders Council, AFGE to the Department of Agriculture met a mixed reception by the Federal Labor Relations Authority. The Authority found that one proposal was prematurely before it, another was not negotiable, and four were within the scope of bargaining.

In the first proposal, the union asked for pay differential for working in frigid conditions. Agriculture demurred, arguing that because the agency had taken the low temperatures into account in classifying the positions, it was prohibited from paying an environmental hazard differential for the duties.

According to the Authority's conclusion, the issue involved a classification appeal and was not properly before it. FLRA dismissed without prejudice the union's petition on this proposal, noting that AFGE could use the classification appeal mechanism. If, as a result of such an appeal, it was determined that the alleged hazards had not been properly considered by the agency, the union could again raise the negotiability of this proposal with the FLRA.

In its second proposal AFGE suggested that when the conveyor belt in a packing plant exceeded 180 beef carcasses per hour, meat graders would grade every second beef rather than being required to grade every one. The Authority ruled that the proposal violated management's protected right to direct employees and assign work, referring to an earlier decision, *3 FLRA 119.*

The third proposal called for portal to portal mileage payments to employees whose duty assignments were rotated, or who occasionally had to report to other duty locations during the same day. Relying on a Comptroller General's decision *(B-131810, January 3, 1980)*, the Authority reasoned that the agency has discretion regarding payment of mileage from an employee's residence to a duty station and the return to the residence as long as the duty station is not the employee's headquarters. Since the agency has discretion, and since no laws or regulations bar this type of arrangement, the Authority found the proposal to be negotiable.

Two other proposals concerning provision of protective clothing and frocks were held negotiable. The Authority said that the employer had cited no regulation or law which would preclude it from exercising through negotiations its discretion to supply protective clothing to employees. The Authority referred to reasons set forth more fully in *3 FLRA No. 118.*

Under its last proposal, AFGE wanted 120 days notice of RIF or reorganization in order to allow it time to negotiate on impact or procedure. The activity argued that the proposal was outside the duty to bargain because it was inconsistent with an Agriculture regulation for which a compelling need existed. The Authority, concluding that the agency failed to support its assertion, ruled the proposal negotiable. *(8 FLRA No. 25—February 11, 1982)*

FLRA Sets Aside Arbitration Awards

Although the Federal Labor Relations Authority infrequently overturns arbitration awards, three were overturned last month on exceptions filed by management and labor. The awards covered pre and postshift activities, a probationer's right to grieve his dismissal, and compensatory time.

Is On-Site Travel Time Compensable Time?

In the first case the Authority set aside as deficient under the Federal Employees Pay Act (FEP) an award which held that time spent proceeding to and from duty stations was not work time.

The dispute arose when the Federal Prison System notified employees that they were required to be at assigned duty stations during their entire tour of duty. This meant that guards had to report first to a control room to check out keys and detail pouches before going to duty stations for the start of their tours. On completion of the tours they were again obliged to go to the control room to return the keys and pouches.

The American Federation of Government Employees grieved, claiming that employees were entitled to overtime for going to and from the control rooms and duty stations. Arbitrator Preston J. Moore judged that under applicable law and regulation the time did not legally constitute hours of work, and denied the grievance.

AFGE contended that the decision was contrary to the FEP Act which authorizes overtime pay for work over eight hours a day and 40 hours a week. The Authority agreed with the union, basing its conclusion on several court decisions.

The Authority held that the guards' preshift and postshift activities were "necessarily, primarily and predominantly for their employer's benefit." Consequently, the arbitration award denying the grievance

(continued on page 4)

Pm 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Supervisor Does Unit Member's Work

Casefacts: In this arbitration case between the Social Security Administration and the American Federation of Government Employees, the parties agreed that the following facts were not in dispute.

In the latter part of 1980 a claims representative in the Pontiac, Michigan district office was having difficulty performing his work. His caseload became delinquent to the point that management removed him from his job responsibilities.

In January management notified Local 3239 that a management person would be assigned to the representative's caseload on a temporary basis so that clients could be promptly serviced.

The union objected, claiming that management's action was unnecessary since there were bargaining unit employees in the office who were ready, willing and able to assume the caseload responsibilities. Two volunteers from the unit offered to do the work on an overtime basis. SSA, however, declined the union's suggestions and assigned a supervisor for about six weeks to clear up the backlog. A grievance ensued.

Under Article IV of the parties' agreement, "Management officials will refrain from unnecessarily performing duties regularly assigned to employees of the unit." Another article stated that management retained the right to relieve employees from duties because of lack of work or for other legitimate reasons and the right to maintain the efficiency of government operations.

AFGE alleged that there were ample unit employees to service the caseload. As it happened, the district office was overstaffed and an available employee was detailed to another district office. Records showed that the Pontiac office was tops in efficiency for this time period.

The union also argued forcibly that no emergency existed. The employer had plenty of notice that the caseload was getting behind. It knew the cyclical workload around the first of each year and could have made provision to handle the matter differently. In the union's eyes, the only types of emergencies that could justify management personnel working in the bargaining unit were mass illnesses, acts of God, strikes, etc.

The union spoke to its legitimate interest in protecting unit employees. Further, as a voluntary organization frequently strapped for money, it was not fair for management to erode AFGE's base by having management do union jobs.

SSA asserted its right to maintain efficiency and its duty to clients to react quickly. It contended that Article IV was designed to prevent routine and continuous performance of bargaining unit duties by management officials not necessitated by operational needs or interests of public service. In this situation, operational needs dictated the assignment of the supervisor. The activity advised that it had no money to detail unit employees from another location, and that a notice requirement took at least two weeks. For these reasons the activity had rejected AFGE's suggestion to have unit employees do the work on an overtime basis.

The activity believed it had demonstrated its good faith by meeting with Local 3239 in advance and by considering the union's suggestions. Only when SSA found operational needs paramount did it assign the supervisor in question.

Issue: AFGE requested that the arbitrator find management in violation of Article IV and that SSA be ordered to comply with the agreement and refrain from unnecessarily performing duties regularly assigned to unit employees.

Award: Arbitrator Peter D. Jason denied the grievance. The case, he said, must ultimately be decided by an interpretation of Article IV, and he believed management's interpretation to be the more proper one.

Arbitrator Jason noted that the union's interpretation was strict. To AFGE, the word "unnecessarily" meant emergency conditions precluding assignment of unit members must exist before management could assign supervisory personnel to do unit work. Management's interpretation was less strict. To SSA, necessity was determined by operational efficiency needs rather than by emergency conditions.

He held that "The contract should be interpreted to allow management some flexibility so that the interests of the public may be protected."

It would not be fair for the employer to assign supervisors if another reasonable alternative were available, he commented, because the union did have a legitimate interest to protect.

In the final analysis there must be a balancing of the interests of the employer, the union and the public. Arbitrator Jason was satisfied that SSA acted in good faith to protect the public interest.

No unit members were available with the necessary time to do an appropriate job. This was merely a temporary assignment. The supervisor worked only on the backlog and did not interview new clients or in any way add to the caseload. There was no danger that the unit would be eroded. *(Social Security Administration and Local 3239, AFGE—July 20, 1981. LAIRS #13473)*

Bench Marks

3 FLMC 82-6 March 26, 1982

Supreme Court Lets Stand Decision in Wright-Patterson Case

The Supreme Court has refused to examine a lower court decision upholding the Federal Labor Relations Authority's application of its "direct interference" standard in a negotiating dispute. On February 22 the justices denied a petition for review filed by the American Federation of Government Employees claiming that a Federal appeals court erred by assenting to the Authority's ruling that the union proposals were not bargainable *(2 FLRA No. 77)*. This is the first time that a request for review of an Authority decision has been acted upon by the Supreme Court, although several requests are pending.

AFGE's proposals to the Wright-Patterson Air Force Base dealt largely with efforts to require that assignment of bargaining unit employees be based on seniority, thus compelling selection of a particular employee.

The Authority determined that five of the proposals were not bargainable because their adoption would directly interfere with management's statutory right to make decisions of substance. Under 5 USC 7106, union proposals intruding upon protected employer rights, including the right to select employees, are not a proper subject of bargaining.

The union contended that the Authority should have found, as it had in some cases, that a properly procedural proposal was negotiable unless its adoption would prevent management from acting at all.

The appeals court found no incompatibility between the Authority's two approaches—the acting at all test as applied to delays in effecting disciplinary actions until grievance procedures had been exhausted in *USCA DC No. 80-1119, July 2, 1981*, and the direct interference test in *USCA DC No. 80-1351, July, 2, 1981*. When reviewing different kinds of proposals, the court said, the FLRA had no obligation to apply an identical standard to both kinds. Further, the union's "constrictively literalist" interpretation of section 7106 would permit bargaining over practically all personnel actions. The judicial decision relied heavily on the doctrine that courts are to yield "great deference" to an interpretation of a statute by the agency entrusted with its administration.

The Supreme Court let stand, without comment, the appeals court decision.

Court Gives Union the Right to See Sanitized SES Self-Appraisal Forms

A union has the right to see performance goals for unit employees contained in self-appraisal forms prepared by members of the Senior Executive Service, so long as any information identifying SES members has been deleted. This decision by the District Court for the District of Columbia drew a careful line between the public's right to know under the Freedom of Information Act and a Federal executive's right to privacy.

When the National Treasury Employees Union asked to see the forms, the Internal Revenue Service denied the request on the grounds of an unwarranted invasion of personal privacy. The union asserted that it needed the material in order to alert itself on upcoming changes in working conditions.

Judge June L. Green found that "performance objectives and expectations established by the executive management of a public agency" must be made public under both FOIA and the Civil Service Reform Act of 1978. The judge emphasized that the executives' names and their self-appraisals must be removed before the union could see the forms. *(Ferris v. Internal Revenue Service: USDC DC, Civil Action No. 81-0383, December 23, 1981)*

Union Loses on Negotiability Petition

The Federal Labor Relations Authority has ruled nonnegotiable five proposals made by the National Association of Government Inspectors to the Naval Air Engineering Center, Lakehurst, New Jersey. All five violate management rights, the Authority judged.

One proposal would have required the agency to maintain two-person crews for safety reasons while the employees were in travel duty status. In the Authority's view, because the language obliged the agency to assign two employees to certain work situations, it directly interferred with management's right to determine the number of employees assigned to a work project or tour of duty, and to negotiate such a determination only if it so chooses.

The union also asked that unit employees be assigned to only one first line supervisor. In order to do this, the Center would have to adopt a certain organizational structure and organize its workforce in a particular way. Two other proposals essentially required that the structure be modified to provide promotion opportunities for certain employees without regard to classification. The Authority determined that the three proposals conflicted with the employer's right to determine its organization.

The remaining proposal would prohibit the assignment of duties performed by employees in one classification series from being performed by employees in any other series. The Authority said this would interfere with management's right to assign work. *(8 FLRA No. 28—February 11, 1982)*

BOOKSHELF

Spot Reviews of Publications and Films

OPM's Office of Labor-Management Relations has issued two reference publications summarizing third party decisions in the Federal sector. They are:

- *Digest of Labor Arbitration Awards in the Federal Service,* Supplement No. 10, July 1981, Purchase No. PB 82-128257, priced at $13.50 for a paper copy and $4.00 for microfiche. This *Digest,* as well as earlier supplements, lists each award by subject matter, issue, date, parties and arbitrator. (Production of future supplements to the *Digest* has been suspended, at least temporarily.)
- *Index of Federal Labor Relations Cases,* July 1981, Purchase No. PB 82-164559, priced at $30.00 for a paper copy and $4.00 for microfiche. The cumulative index contains all arbitration awards and all decisions of the Federal Labor Relations Authority and Federal Service Impasses Panel, as well as relevant decisions of the Merit Systems Protection Board, the Comptroller General and the courts. In addition, it includes all rulings of the Federal Labor Relations Council and the Assistant Secretary for Labor-Management Relations issued under Executive Order 11491, and selected decisions of the former Federal Employee Appeals Authority. There is also an alphabetical listing of subjects.

The publications may be ordered from the National Technical Information Service U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, telephone 703/5574693.

The Federal Labor Relations Authority has just issued a manual on case handling procedures for unfair labor practices:

- *Unfair Labor Practice Case Handling Manual* was prepared by the Office of the General Counsel of the FLRA. Intended only as a procedural and operational guide for the processing of ULP cases by the General Counsel's staff, it does not attempt to set forth substantive or legal doctrines. Nevertheless, the guidelines should be of real assistance to both management and labor. The manual is part of the subscription to *FLRA's Report of Case Decisions,* and subscriptions are available only from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20202.

Due to severe budgetary constraints, the *Classified Index of Disposition of ULP Charges by the General Counsel of the FLRA* will no longer be published. This is a subject matter index to advice memoranda and appeals letters in ULP cases in which the GC either authorized or declined to authorize issuance of complaints. The indexes will be available for public inspection at the Authority's regional offices and the national office of the Office of the General Counsel. They may also be provided upon request, subject to a fee schedule.

(continued from page 1)

solely because the activities did not constitute hours of work was deficient. *(8 FLRA No. 20—February 10, 1982)*

Can Probationer Grieve Dismissal?

When a clerk-typist probationer at the Army Corps of Engineers was dismissed, he filed a grievance. The arbitrator ruled that grievances on termination of a probationary employee were excluded by law from coverage of a negotiated grievance procedure. The National Federation of Federal Employees protested the ruling and won its case.

The Authority, citing *4 FLRA No. 51,* found Arbitrator Henry M. Grether's award deficient. Nothing in the language or legislative history of 5 USC 71, the Authority said, indicated that Congress intended to exclude grievances or arbitration over probationers' terminations when it wrote the Civil Service Reform Act. FLRA's past rulings on this issue are being challenged by the Office of Personnel Management and other government agencies. *(8 FLRA No. 14—February 10, 1982)*

Compensatory Time for Non-Overtime Hours?

The Authority set aside an arbitration award granting compensatory time to the few employees who reported to work on a day in which a heavy snow storm made it impossible for many employees to get to work, either on time or at all. Parties in this third case were the Social Security Administration and Local 1802, AFGE.

As a result of the severe weather, management had decided after four hours to close several offices in the area. Employees who came to work were sent home for the remainder of the day without charge to leave. Employees who did not report or who were on approved leave were administratively excused for the entire day. The union requested four hours compensatory time for the employees who did report for work.

Arbitrator Robert W. Smedley noted that workers should be treated equitably in emergency situations. Finding it "impossible to reconcile [employees on previously approved annual leave] getting a nonworkday credit, the no-shows getting full relief and the grievants getting nothing extra," he sustained AFGE's request.

The Authority, however, accepted SSA's argument that the award was contrary to law. By statute, compensatory time off may be granted as a result of overtime worked. In this case the four hours worked were not overtime. Accordingly, there was no legal basis for an award of compensatory time to the SSA employees who worked that snowy day. *(8 FLRA No. 15—February 10, 1982)*

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The Federal Labor-Management

Consultant

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April 9, 1982

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DEPOSITORY

New Developments Checklist . . .

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Two arbitration awards are altered by Authority . . . p. 1
Revenue agent grieves IRS decision on conflict of interest in second job . . . p. 2
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Panel order settles Army-AFGE negotiations dispute . . . p. 3
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Bookshelf . . . p. 4
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Panel Member Named

Donald F. Rodgers was sworn in on March 17 as a member of the Federal Service Impasses Panel. He fills the unexpired term of Irving Bluestein which expires on January 10, 1985.

Mr. Rodgers is a consultant in government, energy and labor. From 1974-1982 he was director of Energy and Governmental Relations with the International Brotherhood of Teamsters. He served as special consultant to the President for Labor, and counsellor to the Secretary of Labor in 1972-1974. Prior to that he was executive director of the New York Building and Construction Board of Urban Affairs and a business representative with the International Union of Operating Engineers.

FMCS Restructures Jurisdiction of Its Regional Offices

The Federal Mediation and Conciliation Service has issued final rules reducing the number of its regional offices from eight to four. The four offices are: Eastern Region—New York City; Central Region—Chicago; Southern Region—Atlanta; and WESTERN Region—San Francisco. The former offices in Philadelphia, Cleveland, St. Louis and Seattle have been abolished as regional headquarters, and their territories made part of the four remaining offices.

As part of its reorganization, the agency established a Division of Case Control located in the FMCS National Office, 2100 K St. N.W., Washington, D.C. 20427. *All notices of bargaining disputes should be sent to this division* rather than to the Service's regional directors, as previously required.

Details on the geographical jurisdiction of each region and the notification amendment are contained in the *Federal Register* of March 11. The changes became effective March 29, 1982.

FLRA Modifies Two Arbitration Awards

Two arbitration awards were modified by the Federal Labor Relations Authority when it found them inconsistent with Federal Personnel Manual regulations. The first award concerned a position description (PD), and the second, eligibility for promotion.

Position Descriptions Must Be Current and Accurate

The grievance in the Office of the Secretary, Health and Human Services and Local 41, AFGE case arose when a desk audit revealed deficiencies in the grievant's PD. Following the audit, the grievant and her supervisor prepared a revised PD and sent it to the Assistant Secretary in September 1979 for approval and forwarding to the personnel office. When the Assistant Secretary's office declined to process it, the grievant charged that the employer had failed to provide her with an accurate PD. While the grievance was pending, the activity ran a second desk audit and prepared another PD.

Arbitrator Herbert Fishgold found that HHS had violated the parties' labor agreement. He directed the agency to take the action it failed to take in September 1979, namely, the forwarding to personnel of the agreed-to job description.

The employer pointed out that FPM regulations require PDs to accurately reflect duties performed. To forward the 1979 PD would violate these provisions because the list of duties contained in the description was no longer accurate.

The Authority concurred. It modified the award by ordering HHS to prepare and forward a current and accurate PD. *(8 FLRA No. 18—February 10, 1982.)*

AFGE-National Guard Grievance on Promotion

In the second grievance, Local 3953, AFGE charged that management violated the contract by selecting an applicant who did not meet mandatory qualification requirements. Arbitrator James B. Giles, finding for the union, ordered the Oklahoma National Guard to vacate the position. He gave management the choice of either rerunning the promotion action or announcing the job as a trainee position at a lower grade. The Authority, however, upheld the activity's position that the award was contrary to the FPM.

The Guard contended that since the award offered management an option, and since one of the options might not require it to remove the selected employee (if he were to qualify for the trainee position), the award was deficient in ordering that the position be vacated. The incumbant should not be removed in advance of the

(continued on page 4)

PM 1.13:

The Arbitration
Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Soft Sell or Technical Assistance?

Casefacts: In 1977 a tax revenue agent and his wife became interested in a sales and marketing plan of the ABC Corporation which distributes household cleaners, cosmetics, etc. Under the plan a distributor receives income not only from products sold, but also from a complicated bonus system based on sales made by other distributors whom he has sponsored. The couple decided to venture into the business field by seeking to build an ABC distributorship.

The agent requested approval of the outside employment from the Internal Revenue Service. He checked the form to indicate that the prospective work involved "A. Bookkeeping or accounting" and "B. Canvassing or soliciting in which you initiate contact with others." In an accompanying statement he wrote that among his wife's duties as distributor were sales meetings to persuade others to become part of the ABC family, and "I wish to participate in those discussions."

To ensure that management knew what was involved, the agent took his boss to an ABC "opportunity" meeting presented by another distributor. He explained that his participation would be limited to answering technical questions on the bonus system, following his wife's sales presentation.

The agent's request was approved by three management officials. The couple spent the next two years building up the distributorship, and by 1980 were beginning to make money. That same year IRS notified the agent that the original approval was a mistake and was being withdrawn. Efforts to reach a compromise failed, and the National Treasury Employees Union took his grievance to arbitration.

IRS rules restrict moonlighting by technical and enforcement employees who work directly with taxpayers. An outside job entailing "communication by the employee with taxpayers . . . for the purpose of selling, soliciting or canvassing" will generally be denied, "although exceptions may be made under mitigating circumstances." The rules are designed not only to prevent a possible conflict of interest, but the appearance of such a conflict.

IRS maintained that even though the grievant did not engage in direct selling, his participation at the meetings in the manner he described must be considered a solicitation, and his comments were clearly "communication." Management had considered making an exception but decided not to since the potential for conflict of interest existed in the grievant's continued participation.

The grievant countered that he sat in the back of the room and his wife made the sales pitch. Unsure of her ability to explain the bonus system, she referred questions to him when she encountered difficulties. Since July 1980 when he ceased participating in meetings, his wife lacked confidence in answering inquiries, they had sponsored fewer people as distributors, and business declined by 50 percent.

The union pointed to the grievant's honest attempt to explain his activities to management. He had even designated them as "canvassing or soliciting" in order to eliminate any possible suggestion that he was misleading the agency on whether his business involvement was permissible.

Issues: Were the rules properly interpreted to cover the activities of the grievant? If so, was it arbitrary or capricious of the agency not to grant him an exemption from its provisions in view of the earlier approval in 1977?

Award: Arbitrator John E. Dunsford found that IRS acted improperly by revoking its earlier decision. He concluded that the grievant's request should be approved, with this addition to the written statement: 'I may answer questions of a technical nature at the end of these meetings in which she discusses the marketing plan."

Although the arbitrator accepted the grievant's description of his participation as truthful, there still remained the difficult question of whether the activity was a form of selling or solicitation. Answering technical questions obviously made the agent a part of the presentation in a way that at least approached the area of solicitation. In view of the grievant's self interest, and the natural temptation in the process of answering a question to encourage the audience to become distributors, there was a real danger that his responses might become a subtle form of selling.

If the grievant's request were an original one, the arbitrator would have been disposed to consider management's disapproval as reasonable. This dispute, however, was not one of first impression. Based on agency authorization the grievant began almost three years of hard work and financial risk to build the business. That investment was now somewhat imperiled through the employer's radical change of heart.

Under the circumstances, it struck Arbitrator Dunsford as arbitrary and capricious for IRS to revoke a prior and fully informed approval of activities which could only marginally be considered as solicitation—and then only by reference to the possibility of their abuse—when the impact of that revocation might have severe economic consequences.

The arbitrator emphasized that he was not impugning management's determination that in the future it would prohibit this type of activity. *(Internal Revenue Service and National Treasury Employees Union, October 5, 1981. LAIRS #136665.)*

The Labor-Management
FORUM

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Authority Extends Expiration Date of Interim Rules on Attorney Fees

The Federal Labor Relations Authority has extended to July 15, 1982 the expiration date for its interim rules and regulations governing awards of attorney fees. The previously-set expiration date was March 15. (See the *Federal Register,* March 16, 1982)

Dining Alfresco

A bargaining dispute between the U.S. Military Academy at West Point, New York and Local 2367, AFGE was resolved by an order of the Federal Service Impasses Panel. The Panel framed its own contract language for the two issues: lunch at remote work spots and on-call duty.

Lunch at Remote Worksites

The academy has 14,000 acres of unimproved land, and employees are transported to and from remote work sites by army vehicles. For the past several years a local regulation prohibited the use of these vehicles for riding to and from the various eating facilities on the grounds for the 45 minute unpaid lunch period.

The union proposed that employees working away from shop areas be provided an adequate eating facility, one which was sanitary and heated in the winter. If this could not be done, employees would be returned to a shop area with eating facilities or else compensated for 45 minutes overtime.

The army counterproposed that when employees were scheduled to work at remote locations with no eating facilities, it would try to give them advance notice so they could make appropriate arrangements. The activity also offered to provide adequate cleaning materials for employee use prior to lunch while working at remote locations.

AFGE contended that the present practice was to return employees from remote worksites to shop areas for lunch. If this were discontinued, workers would be forced to spend lunch periods at the job site while exposed to the elements. The union maintained that employees should be compensated for lunch time if not returned to sheltered areas. Moreover, military personnel were transported from worksites to mess halls in government vehicles, and civilian employees should get similar treatment.

The employer admitted that while employees might have been transported a few times from remote locations to shop areas for lunch, this was not a general practice because it was contrary to regulations. The academy further argued that much productive time would be lost if the union's proposal were implemented.

Concerning AFGE's demand for heated facilities or 45 minutes overtime, the activity maintained that the former was not feasible and the latter was contrary to rules. And finally, it was inappropriate to compare working conditions of soldiers and civilians since the army was required to furnish meals to military personnel. In any event, soldiers were frequently provided a hot meal or box lunch rather than returned to the mess.

The Panel directed the parties to adopt language providing that during inclement weather the employer must furnish either adequate on-site lunch facilities or transportation to and from existing luncheon facilities in shop areas.

On-Call Duty

In the second issue, AFGE wanted volunteers only on the on-call roster, and no discipline for employees who failed to report after being called.

The academy proposed a 90 day test period for the voluntary roster, followed by a management evaluation and determination as to whether to continue it. While the voluntary system had once been tried and found wanting, management was willing to try again. But regardless of the type of roster, workers must keep the activity informed as to where they might be reached and they must report when called. Failure to do this could mean disciplinary action.

The Panel ordered the parties to adopt a voluntary roster for 18 months, after which either party could reopen negotiations. Under FSIP's language, disciplinary action could be taken against an employee who accepted on-call status but did not report for duty when called or furnish a substitute. *(Case No. 81 FSIP 135—March 3, 1982)*

Foreign Exchange

The Federal Labor Relations Authority has dismissed as moot a union request for a negotiability decision on whether employees should be able to use Korean currency as well as U.S. dollars in clubs at the Yongsan military base. The union proposal was an attempt to change a new army regulation requiring payment in U.S. currency only.

The union had raised the same issue in an unfair labor practice complaint, and the FLRA's General Counsel found no basis for issuing a complaint since the army regulation effected no material change in conditions of employment. In dismissing the appeal and complaint, neither the Authority nor the General Counsel reached the negotiability issue of whether the type of money used constituted a condition of employment *(8 FLRA No. 39—March 11, 1982)*

Put Your John Hancock Here

The union's proposed timekeeping procedure is negotiable, the Federal Labor Relations Authority ruled, and does not interfere with management's right to determine its internal security practices or its means of performing work. The Authority's decision came in response to a petition for review filed by Local 1760, AFGE when the Social Security Administration refused to bargain on the union's suggested sign-in/sign-out register. *(8 FLRA No. 40—March 11, 1982)*

BOOKSHELF

Spot Reviews of Publications and Films

A 54 page brochure just released by the Federal Labor Relations Authority provides guidelines to the Federal sector labor law. Designed to assist employees, unions and agencies, it contains a non-technical, detailed summary of the statute. The booklet also explains the Authority's structure and, where applicable, refers the user to the specific statutory or regulatory section.

Guide to the Federal Service Labor-Management Relations Statute may be purchased for $4.25 from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, using Order No. 063-000-00007-8.

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corrective action, depending on which alternative management selected.

The Authority concluded that to the extent the award ordered that the position be vacated prior to the rerunning of the action—without a specific determination that the employee was not entitled to remain under *either* alternative—it was inconsistent with the FPM. FLRA accordingly modified the award by deleting the required removal. *(8 FLRA No. 23—February 11, 1982)*

No Conflict Between FOIA, CSRA on Release of Data, Court Finds

Enactment of the Civil Service Reform Act does not preempt release of data to a recognized union under the earlier Freedom of Information Act, a Federal district court ruled, and the U.S. Customs Service was mistaken in assuming that it did. Customs had refused to answer a union's FOIA request for studies concerning overtime and certain duties of customs inspectors.

The agency contended that the CSRA's passage implicitly repealed FOIA requirements to disclose information to exclusively recognized unions operating within CSRA's statutory framework, and that the National Treasury Employees Union's request must be processed through CSRA procedures. Customs based its case on 5 USC 7114(b)(4) which allows an agency to refuse to disclose to a union information relating to internal collective bargaining guidance for management officials.

The District Court for the District of Columbia held that neither the language nor the legislative history of the CSRA states explicitly that Congress intended to revoke or preempt the FOIA to any extent.

"The cardinal rule is that repeals by implication are not favored," Judge June Green said. "Where there are two acts upon the same subject, effect should be given to both if possible . . . unless a positive repugnancy exists between the two statutes."

In this case the court found no inconsistency, much less repugnancy, between the two acts. Custom's theory would lead to the untenable conclusion that agency records relating, however tangentially, to collective bargaining and which did not fit within FOIA's exemptions, could be obtained under FOIA by any persons except the exclusive bargaining representative. The court held that if an unrelated third party can demand access to certain data under FOIA, the union should be able to do the same.

Judge Green ordered Customs to begin immediately processing the union's FOIA request. The agency was given 10 days to either provide the requested materials or notify the union and the court of its decision to withhold some or all of the materials, and the explicit basis for that withholding. *(National Treasury Employees Union and U.S. Customs Service, USDC DC, Civil Action No. 79-1208, February 18, 1982)*

A Striking Example

Reversing an initial decision of its regional office, the Merit Systems Protection Board determined that two Federal employees had not participated in a strike and should not be suspended and discharged. The Tennessee Valley Authority workers asserted that they failed to report for duty on July 30, 1980 because they feared what strikers might do to them if they crossed the picket line. Other witnesses testified to an atmosphere of fear which included harassment, intimidation, rocks thrown at cars, and employees being spit at and injured.

The MSPB noted that the employer introduced no evidence to overcome the two appellants' rebuttal. TVA had failed, therefore, to prove by a preponderance of evidence that the employees participated in an unauthorized work stoppage. *(MSPB 07528010325, February 18, 1982)*

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New Developments Checklist . . .

Arbitration decision violated employer's reserved right, FLRA finds . . . p. 1

Federal court holds employee has right to file for damages against union breaching fair representational duty, and against employer for breach of labor contract . . . p. 1

Employee should obey lunch-hour directive from supervisor and grieve later, arbitrator determines . . . p. 2

Regional structure of Authority . . . p. 3

Unequal representation by union is unfair labor practice at Norfolk Naval Shipyard . . . p. 4

In its first order, Foreign Service Impasse Disputes Panel tells parties to adopt unions' proposal . . . p. 4

Authority Upsets Arbitration Award

An arbitration decision ordering retroactive promotion and back pay to an employee with the most seniority was set aside by the Federal Labor Relations Authority. The Authority found that the award denied the employer's statutory right to fill positions.

Arbitrator W. Thomas Mulhall had noted that under the agreement and agency regulations, candidates for promotion would be considered on the basis of qualifications, performance, potential and length of service. However, he found evidence that the three criteria were not considered in this case, and that length of service was the only remaining objective criterion. The arbitrator, determining that the most senior candidate was entitled to the position, overturned the activity's selection.

This award, the Authority held, clearly denied management its right to make the actual selection decision. *(8 FLRA No. 56—March 24, 1982)*

Employees May Sue Union for Breach of Fair Representation, Court Holds

A district court has upheld the right of Federal employees to file damage suits against their exclusively recognized union if they believe the union breached its duty of fair representation. Employees may also sue their employer for breach of the collective bargaining agreement under 28 USC 1346, although recovery would be limited to back pay lost. The court denied motions for dismissal from the Defense Language Institute (DLI) and Local 1263 of the National Federation of Federal Employees (NFFE) alleging that the court lacked jurisdiction.

The court's reasoning was that administrative boards set up under Federal and private sector labor acts are more concerned with broad questions of policy than with individuals, so that if individuals are not allowed to enforce the duty of fair representation in court, they may gain no practical benefit from the labor laws.

The case began in 1977 when a language instructor at DLI was promoted from a GS 9 to a GS 11. This was grieved by another teacher, and NFFE took the grievance to arbitration. The arbitrator found that the selection process used by DLI was erroneous, and the position was reopened. The second teacher got the promotion, and the instructor was demoted back to a GS 9.

The first instructor, the plaintiff, filed grievances with DLI, but Local 1263 declined to invoke arbitration. Advocacy of the plaintiff's position, the union said, would conflict with its previous advocacy of the second teacher's position and the arbitration award. The plaintiff himself attempted to invoke arbitration, but was turned down by the union and DLI.

The plaintiff then filed unfair labor practice charges against the union and DLI. The General Counsel of the Federal Labor Relations Authority denied the complaint against the activity, but found that the union had violated its duty to represent all members of the bargaining unit equally. As a remedy, NFFE and the Authority's regional director reached a settlement agreement whereby the union notified unit members that in the future it would not inform employees that it could not represent more than one employee seeking the same position.

This settlement afforded no relief to the plaintiff as an individual. He next asked the General Counsel to review the settlement with the union, and reconsider the decision not to issue a complaint against the employer. Both requests were denied.

The plaintiff then filed suit in the U.S. District Court for the Northern District of California against DLI and the union. He asserted that NFFE breached its fair representation duty and that the employer breached the agreement. He also asserted three constitutional claims against DLI.

Judge Robert F. Peckham noted that the new Federal labor statute entrusts a broad range of functions to the Authority and narrowly circumscribes the role of the courts. Nevertheless, drawing from private sector case law, the judge determined that in this case the Authority had subordinated the individual's interests to the interests of the group. He accordingly held that the instructor should be allowed to seek relief against NFFE in court.

Turning to the plaintiff's claim against DLI for violation of the contract, the court said he must refile a claim

(continued on p. 4)

PM 1. 13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor. It is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Ain't Misbehavin'

Casefacts: The grievant, an Air Force employee, was still on his lunch break when he returned to the office and sat down at his desk. Leaning back in his chair, he put his feet up on the desk and began reading a newspaper.

His supervisor, a sergeant, was working at his own desk about three feet away, preparing for an anticipated inspection that afternoon by a visiting general. The sergeant asked the employee to take his feet off the desk and go the lounge area if he wanted to read the paper. The employee remained where he was, and the sergeant repeated his request.

At this point, accounts differ. According to the sergeant, the employee answered, "No, I don't have to. I am in non-duty status, and I don't have to listen to you." According to the grievant, he ignored the first request because he thought the supervisor was joking, but responded to the second request with "I am on non-duty time."

The sergeant stood up and said loudly, "You will take your feet off that desk, and if you want to read that newspaper, do so in the lounge area." The grievant then stood up, grabbed his paper, and walked toward the lounge, saying (according to the sergeant) "Go to hell—and you can write that down too." The grievant asserted that his words were "Oh hell, I am going down the hall to lie down."

After a counselling session in which the grievant told the supervisor that "I don't have to listen to you when I am on my non-duty lunch hour," the sergeant issued the grievant a letter of reprimand for insubordination. The employee grieved the reprimand.

The grievant worked in a section which monitors the packing and transportation of household goods for base personnel. Open to the public, the office is frequently visited by clients. The grievant's desk was adjacent to, and visible from, the doorway through which clients, fellow employees, civilian and military supervisors enter the section work area.

The grievant claimed that his actions that day were in no way vastly different from actions he had taken during hundreds of previous lunch hours. It was common practice for many people in the office to eat and relax at their desks during lunch hour, and no one had ever been reprimanded for doing this.

The parties cited two documents to support their arguments. First, their labor agreement which requires that disciplinary actions "be based on just cause, initiated properly, and administered in a fair and equitable manner."

Second, an Air Force regulation which authorizes disciplinary action for off-duty misconduct only if the misconduct affects the employee's job performance, meaningfully involves the Air Force, or is otherwise detrimental to the efficiency of the service.

Issue: Was the letter of reprimand charging the grievant with insubordination issued for just cause?

Award: Arbitrator Dana E. Eischen denied the grievance.

It is well established in the arbitration of labor-management disputes, he wrote, that insubordination occurs when an employee willfully fails or refuses to obey a reasonable work-related order of a duly authorized supervisor.

Under most circumstances, an employee is required to obey directives even if he sincerely believes that they are contrary to the collective bargaining agreement or would violate his rights thereunder. In such cases, the employee's recourse is later to file a grievance to test the issue. The maxim is "Obey now, grieve later."

Failure to obey is usually justifiable only when an employee reasonably believes that obedience would endanger health or safety, or be illegal.

In this case, Arbitrator Eischen found no element of danger or illegality in the sergeant's order to the grievant to remove his feet from the desk and read his newspaper elsewhere. Nor could he find that the order was in any way unreasonable.

The grievant's desk was visible to many people, the arbitrator said, and it was not arbitrary or unreasonable for the supervisor to try to maintain a business-like appearance and atmosphere, especially on a day when a visiting general was inspecting the base. In such circumstances, the grievant's repose at this desk was detrimental to the efficiency of the service and did meaningfully involve the Air Force.

The arbitrator noted that it was irrelevant under the "Obey now, grieve later" maxim whether the grievant thought he had a right, either by the agreement or past practice, to relax with his feet propped up on his desk and read his newspaper during lunch hour.

"Whatever his duty status, he was subject in the office to reasonable orders of his superiors . . . during business hours," and failure to obey was insubordination. Moreover, the grievant aggravated his insubordinate behavior by telling his supervisor to "Go to hell." *(Department of the Air Force and Local 200, Service Employees' International Union—February 14, 1981. LAIRS #13205)*

Regional Structure of FLRA

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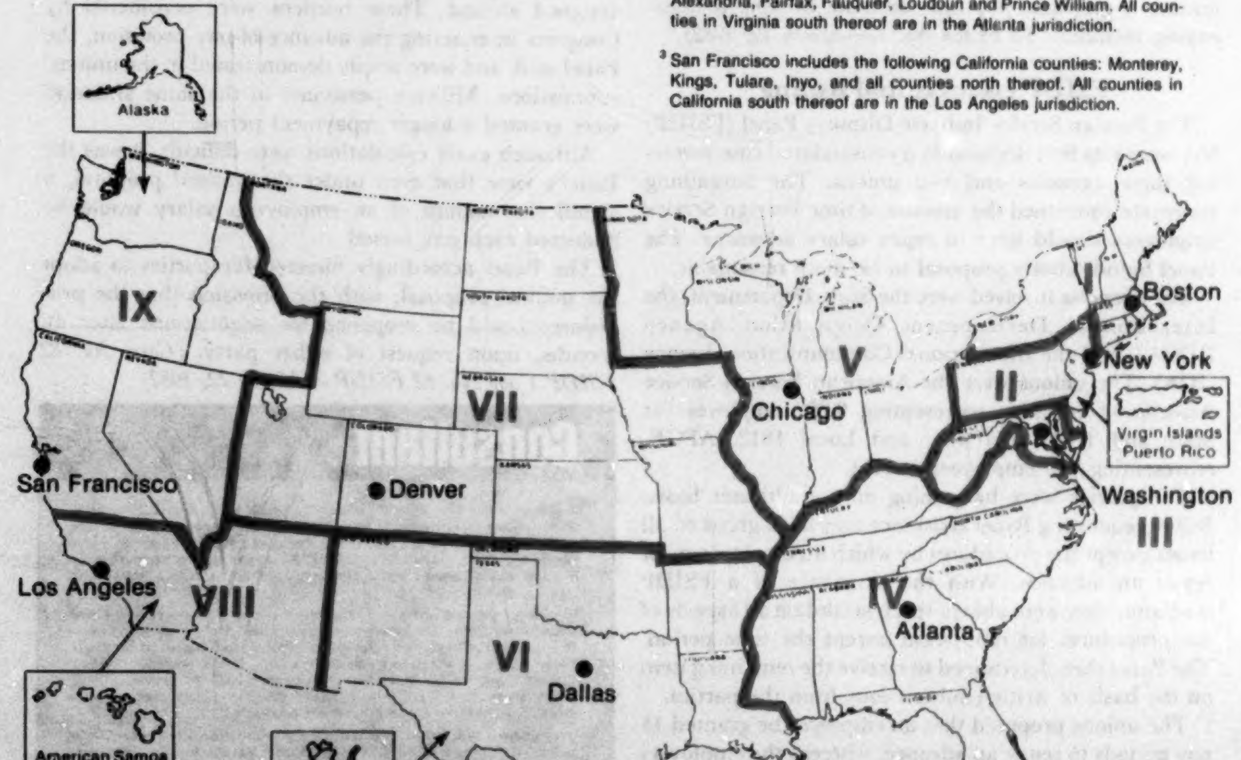
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under 28 USC 1346 and indicate the amount of damages sought. If the amount were greater than $10,000, the U.S. Court of Claims would have jurisdiction, not the district court.

As to the plaintiff's allegations that DLI deprived him of property without due process of law, thus violating his constitutional rights, Judge Peckham dismissed the two fourteenth amendment claims. The judge upheld the fifth amendment claim, noting that if the plaintiff won his case, he could recover only back pay since sovereign immunity bars recovery of general compensation damages in actions of this nature. *(USDC ND Cal. No. C-81-2745, March 9, 1982)*

Union Found Guilty of ULP

The union committed an unfair labor practice by coercing an employee to join, and by failing to represent equally all bargaining unit employees. This ruling by the Federal Labor Relations Authority upheld charges filed by the Norfolk Naval Shipyard and the employee against the Federal Employees Metal Trades Council/International Association of Machinists.

The evidence established that union leadership had advocated a policy of providing lesser representation to nonmembers. The employee had applied for membership "out of justifiable fear that the union would not initiate a grievance for him until he became a dues-paying member." *(8 FLRA No. 47—March 19, 1982)*

FSIDP Issues Initial Ruling

The Foreign Service Impasse Disputes Panel (FSIDP) has issued its first decision in a consolidated case involving three agencies and two unions. The bargaining stalemate concerned the amount of time Foreign Service employees should have to repay salary advances. The Panel found labor's proposal to be more reasonable.

The agencies involved were the State Department, the International Development Cooperation Agency (IDCA), and the International Communication Agency (ICA). The unions were the American Foreign Service Association (AFSA), representing 9,000 employees at State and 1,700 at IDCA, and Local 1812, AFGE, representing 900 employees at ICA.

The parties were bargaining on a multi-unit basis. Before requesting Panel assistance they had agreed on all issues except the procedures by which an employee must repay an advance. With the assistance of a FSIDP mediator, they were able to reach accord on all aspects of the procedures for repayment except the time period. The Panel then determined to resolve the remaining item on the basis of written submissions from the parties.

The unions proposed that an employee be granted 18 pay periods to repay an advance, whereas the employers proposed 12.

The employers argued that their proposal properly accommodated the interests both of employees receiving advances and taxpayers who bear the burden of "renting" the money advanced. Their proposal would not cause undue hardship because another clause in the agreement allows a 20 to 39 day grace period between receipt of the advance and the first repayment deduction. Moreover, a regulation permits an ad hoc extension of repayments in hardship cases.

Management pointed out that the Defense Department requires its civilian employees to repay salary advances within 13 pay periods from the date of the advance. Management emphasized that it had made many, many concessions during negotiations.

The unions contended that under the employer's proposal, one-half an employee's salary would be deducted for the first six months after receipt of an advance. Thus the advance would not accomplish the Congressional intent "to ease the transition and to ensure that funds are available in emergencies."

Further, ad hoc extensions were unacceptable because they would be a "stigma" on an employee's record. AFSA and AFGE cited a Defense regulation for military personnel which provides that salary advances must be repaid within 24 pay periods.

The Panel was not persuaded that the employers' proposed repayment period was sufficient in view of the financial burdens imposed on Foreign Service personnel assigned abroad. These burdens were considered by Congress in enacting the advance-of-pay provision, the Panel said, and were amply demonstrated in the unions' submissions. Military personnel in the same situation were granted a longer repayment period.

Although exact calculations were difficult, it was the Panel's view that even under the unions' proposal, a significant amount of an employee's salary would be deducted each pay period.

The Panel accordingly directed the parties to adopt the unions' proposal, with the provision that the procedures could be reopened for negotiations after 18 months, upon request of either party. *(Cases No. 82 FSIDP 1 and No. 82 FSIDP 2, March 22, 1982)*

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Circuit Court Supports FLRA Policy on Payment of Travel and Per Diem

An appeals court has decided that Federal agencies must pay travel and per diem expenses of union negotiators in order to place management and labor on an equal footing in the collective bargaining process. The decision upheld the Federal Labor Relations Authority's interpretation of 5 USC 7131(a), terming the Authority's policy "reasoned and supportable."

Because Section 7131(c) on official time allows the Authority to mandate reimbursement of travel and per diem to union negotiators involved in FLRA proceedings, official time must consequently be interpreted uniformly throughout the provision, the opinion said.

The U.S. Court of Appeals for the Ninth Circuit noted that Congress has determined that bargaining in the Federal Service "contributes to the effective conduct of public business." Thus, if union negotiators are on official time, they are engaged in official government business and are entitled to reimbursement for expenses.

Congress specifically found that bargaining is in the public interest, and the Authority took this a step further by reasoning that equalization of the positions of labor and management enhances the effectiveness of collective bargaining. The court endorsed FLRA's reasoning.

In a second issue in the case, the court supported the Authority's policy that statutory provisions on official time apply to mid-term bargaining as well as to negotiations on a basic labor contract.

The Authority's travel and per diem policy of December 1979 was challenged by the Bureau of Alcohol, Tobacco and Firearms in *4 FLRA No. 40* in an attempt to have the policy set aside. *(USCA Ninth Circuit No. 80-7673 and No. 81-7021, March 22, 1982)*

The Justice Department indicates that it will seek review of the decision by the full Ninth Circuit. Although the union's travel costs in this case were only $30.00, expenses for full contract negotiations covering a large nationwide unit would amount to much larger sums. Some half dozen other cases on the controversial travel and per diem policy are pending before the courts.

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Authority Affirms Grievability of Dismissal of Probationers

In a lengthy decision covering 16 union demands, the Federal Labor Relations Authority held negotiable a proposal authorizing probationary employees to grieve terminations. The Immigration and Naturalization Service, and OPM in an *amicus* brief, had contended that the proposal conflicts with Federal sector labor law and OPM regulations. The Service and OPM say they will seek court review of the Authority's ruling.

Management argued that 5 USC 7121(c)(4) excludes "any examination . . . or appointment" from the negotiated grievance procedure, and that Congress intended these terms to refer to the probationary period, including the evaluation of a probationary employee. Further, FPM 315 describes the probationary period as the "final and highly significant step in the examining process." In the view of the Service and OPM, the traditional meaning of examination encompasses the probationary period.

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

A Telephone Tipster

Casefacts: In November 1978 a telephone informant filed a startling complaint against the customs inspector. The caller, a "scorned lover," alleged that he and the inspector had maintained a homosexual relationship, that the employee had failed to declare an imported dog, and that the Customs Service should not employ such a person.

Customs substantially completed its investigation of the complaint in February 1979, and fired the inspector on December 5, 1980. He was charged with failing to declare and pay duty on a Great Dane he had brought into the U.S. from Canada, entertaining a member of the public at a Customs facility while on duty, excessive use of government telephones for personal calls, being an unsuitable person to conduct personal searches on male members of the public, and several similar charges.

The National Treasury Employees Union and the grieving inspector contended that most of the charges were unfounded and were designed to mask the true reason for the discharge—the inspector's homosexuality.

Discharge for this reason was improper, NTEU argued, and management's action constituted a prohibited personnel practice. Moreover, Customs violated the contract by failing to carry out discipline in a prompt manner. The grievant claimed that he had believed the dog to be duty free, and was not familiar with the regulations on importing purebred animals.

The employee was a discreet "closet" homosexual. He succeeded so well in separating these activities that none of his co-workers or supervisors had knowledge of his sexual inclinations until he was discharged. Witnesses at the arbitration hearing considered him professional, competent and personable, and he was rated as a superior employee.

Under the agreement, adverse actions may be only for such cause as will promote the efficiency of the Service. The agreement, 5 USC 2302(b), and OPM policy prohibit discrimination on the basis of conduct which does not adversely affect the job performance of the employee or that of others.

Issue: Was grievant's removal for such cause as will promote the efficiency of the Service?

Award: The arbitrator ordered the grievant reinstated to his former position with retroactive benefits to the date of his removal. But because the offense involving the dog warranted a 14-day suspension, the grievant's back pay would accrue only from December 19, 1980. The back pay would be further reduced by $400, the equivalent value of the dog he failed to declare.

The arbitrator found that the grievant had drawn a hard line between his activities as customs inspector and his behavior as a practicing homosexual. His behavior did not manifest itself in any way which might result in notoriety or public censure, or reflect unfavorably on his agency. There was no reason to suppose he would engage in unwarranted behavior while conducting a personal search.

Holding that the employee had been fired essentially because he was a homosexual, "... it follows that Customs discriminated against [him] on the basis of conduct which does not adversely affect either the employee's own job performance or the performance of others. Such discrimination ... is a prohibited personnel practice." Discrimination occurred because of the inspector's sexuality per se, which did not affect his own or others' performance.

Looking at the charges of personal phone calls and the entertainment of unofficial visitors, the arbitrator determined that while the inspector had engaged in such activities, so had other employees who were not disciplined. Prior unenforcement barred the employer from an effort to do so in this case.

The arbitrator found significant the fact that for two full years after the discovery of the alleged offenses, the employer allowed him to pursue his regular duties as customs inspector. It would be difficult to argue that the adverse action was carried out in a "prompt and timely manner," the arbitrator said, and management had offered no explanation for the delay.

Turning to the failure to declare the dog, the arbitrator could not believe that an experienced inspector did not know that he should have made a written declaration. A customs inspector may be ignorant on many subjects, but not about clear and definite Customs regulations.

The employer was justified in imposing discipline for this offense. "His breach of duty could have an adverse impact on fellow employees; they should not believe that the rules which they are obliged to enforce apply fully to the general public but to a lesser degree to Customs officials." *(U.S. Customs Service and National Treasury Employees Union, November 13, 1981. LAIRS #13756)*

The Labor-Management FORUM

Union Recognition in the Federal Sector

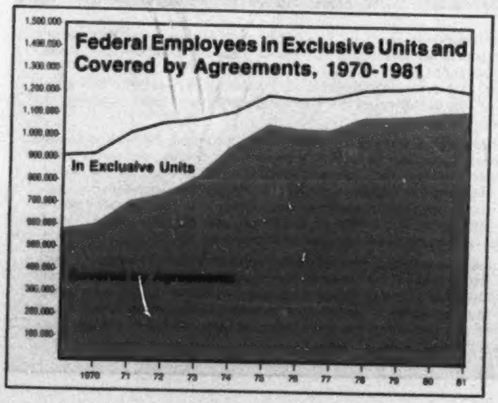
Although showing a slight decline in employees represented, labor organizations continue to hold exclusive bargaining rights for almost two-thirds of non-Postal Federal workers, the Office of Personnel Management reports. Unions represented 1,234,256 employees in November 1981, only 15,743 below the 1980 level. These figures reflect the impact of the decertification of the Professional Air Traffic Controllers Organization last October.

On a percentage basis, 61 percent of employees were represented, a figure which has not changed for the past three years. OPM says its percentages relate to total employment in the Executive Branch, including such employees as supervisory and management personnel not eligible for union representation under 5 USC 71.

The trend toward fewer but larger bargaining units also continues—from a peak of 3,608 units in 1975 to the 1981 low of 2,463. During this same period the average size of Federal units rose from 333 to 501 employees. The change is due to a consolidation-of-units policy established under Executive Order 11491 in 1975 and carried over to the Civil Service Reform Act of 1978. Last year's decrease in units resulted from major consolidations in Health and Human Services, Commerce, Interior and Veterans Administration.

Ninety-three percent of the 1.2 million employees represented by unions are covered by negotiated agreements, the same percentage as in 1980. A closer look at the statistics, however, reveals a 14,756 drop in the number of workers covered.

The recognition of blue collar workers, traditionally the most heavily represented, increased from 86 to 88 percent, and now stands at 384,890 employees. In contrast, white collar representation dipped to 849,366, a decline of 25,492, but remains at 54% of the workforce.



The Big Six

The American Federation of Government Employees, AFL-CIO kept its number one position among the "Big Six" unions representing non-Postal Federal employees. AFGE represented 69,225 employees in the period ending November 1981, a decrease of 3,759 from the prior period.

The National Federation of Federal Employees held exclusive recognition for 136,323, an increase of 11 persons. The National Treasury Employees Union represented 106,747, a 1,618 reduction. Representation by the National Association of Government Employees was down by 1,147 employees to 75,635.

The Metal Trades Council, AFL-CIO represented 65,628 employees, up by 1,282. The International Association of Machinists, AFL-CIO scored the largest increase: from 33,086 in 1980 to 35,596 in 1981.

Non-Appropriated Fund Activities

At non-appropriated fund activities, the number of represented employees decreased by 6,436 to 67,003 And as a result of unit consolidations, bargaining units slid from 326 in 1980 to 260 in 1981.

Postal Service

OPM shows separate data for Postal workers who have their own labor-management relations program under the Postal Reorganization Act of 1970. Their representation jumped upward—from 586,104 in 1980 to 605,816 last year, or 91 percent of the workforce. When Postal and Executive Branch data are combined, the total number of employees with union representation is 68 percent or 1,840,072 workers. The comparable 1980 figure is 67 percent or 1,836,103.

Report to Be Published

OPM's summary was released April 13. More detailed statistics will be published later in an FPM Bulletin and a book entitled *Union Recognition in the Federal Government—November 1981.* The final report will contain a complete listing of all recognitions in the Executive Branch, including the Postal Service.

Exclusive Recognition by Major Unions November 1981

Union	Employees Represented	Recognition Units	Percent Change in Employees Represented 1980-1981
AFGE	692,225	1,093	Decrease less than 1%
NFFE	136,323	423	Increase less than 1%
NTEU	106,747	28	Decrease less than 1%
NAGE	75,635	232	−2%
MTC	65,628	49	+2%
IAM	35,596	88	+8%

(continued from page 1)

The Authority, however, determined that neither the statute nor its legislative history supports a finding that "examination" and the "examining process" were synonymous. Its ruling relied heavily on an earlier decision, *4 FLRA No. 51*, in which it ruled that a probationary employee's dismissal is subject to the negotiated grievance procedure unless the parties specifically exclude it.

In a concurring opinion, Member Leon B. Applewhaite wrote that insofar as the proposal related to the procedural aspects of the termination of probationary employees, and was within the confines of the *4 FLRA No. 51* decision, he agreed with his fellow members. He added, however, that he was "unable to agree with any expansion of this reasoning to include the substantive consideration of management's actions."

Another union proposal called for grooming standards to allow the wearing of beards, mustaches and long hair. The Authority declared this negotiable since the proposal concerned an "appropriate arrangement" for employees adversely affected by the agency decision that there will be grooming standards.

AFGE also proposed that if an employee expected disciplinary action to result from an interview, the interview would be postponed for two days so that representation could be arranged. The Service maintained that because there might be a need for immediate information, the proposal conflicted with its right to determine internal security practices. The Authority commented that the agency had not shown a delay would negate its right. The FLRA ordered the employer to bargain over this proposal, adding that if the agency were still concerned about a delay, the parties could always go to the Federal Service Impasses Panel to resolve the dispute.

The remaining 13 proposals drew a mixed response from the Authority: six were held negotiable; four not negotiable; one negotiable only at management's option; one moot; and one was withdrawn when the parties reached agreement. *(8 FLRA No. 75—April 6, 1982)*

Court Sets Aside FLRA Decision

Can National Guard technicians negotiate a grievance procedure allowing them to grieve and seek arbitration on RIFs and adverse actions? No, said the Third Circuit Court of Appeals, because the 1968 National Guard Technician Act prohibits appeals from an adjutant general's decision on these matters. The court set aside a ruling by the Federal Labor Relations Authority that the Guard must bargain on the union proposal. The case marks the first court reversal of an Authority ruling.

The Authority had argued that the Federal labor relations statute supercedes the earlier law, even with respect to matters previously within a state adjutant general's unreviewable discretion. The court disagreed, observing that the labor law exempts from bargaining matters specifically provided by Federal statute.

The Technician Act "imposes a limit on appeals procedures . . . notwithstanding any other provision of law," and to accept the Authority's premise would negate the act. Consequently, the court held that Technician Act provisions remain as exceptions to 5 USC 71.

The court noted that while it placed considerable weight on the Authority's interpretation of 5 USC 71, "we are not obligated to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes." *(USCA Third Circuit No. 81-1592, April 12, 1982)*

Interior Decorating

The agency erred by refusing to bargain on the implementation of an open space office arrangement, the Federal Labor Relations Authority said. The Authority was not persuaded by Internal Revenue Service claims that the union proposal would interfere with management's statutory right to determine the "technology, methods and means of performing work."

The open space design itself was not in dispute. Rather, the National Treasury Employees Union wanted such things as sound-deadening drapes, a "white noise" sound system, accoustical carpeting, and a requirement that employee counselling sessions be held in closed offices—and all of these were held negotiable.

NTEU's second proposal would have established the first and last 15 minutes of each work day as time devoted to packing and unpacking files. The Authority concluded that the proposal violated management's right to assign work, and was not negotiable. *(8 FLRA No. 38—March 11, 1982)*

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FLRA's General Counsel Nominee

President Reagan has nominated Lawrence Y. Goldberg as General Counsel of the Federal Labor Relations Authority for a term of five years. The appointment requires confirmation by the Senate. He will succeed H. Stephan Gordon, who served as General Counsel from July 1979 to March 1982.

Mr. Goldberg is currently a consultant to the Department of Education, and prior to that served as assistant director for external affairs at the Community Services Administration. Before that he was president of Lawrence Y. Goldberg Associates, Inc. In 1973-1974 he was a vice president of Brandeis University, Waltham, Massachusetts.

Mr. Goldberg holds an undergraduate degree from Brown University and a J.D. degree from Harvard Law School.

Arbitration Award Upheld by FLRA

When an arbitrator finds a grievance not arbitrable, he is not obliged to consider the merits of the grievance before reaching his decision. So ruling, the Federal Labor Relations Authority dismissed exceptions to the award of Arbitrator Charles F. Ipavec filed by the American Federation of Government Employees.

The arbitrator had announced his intention to hear both the arbitrability issue and the merits of the grievance, but later found that time did not permit his hearing both. *(8 FLRA No. 61—March 25, 1982)*

Authority Explains Decision

Although denying the Army's request for reconsideration of a negotiability determination, the Federal Labor Relations Authority clarified its earlier decision in view of the agency's "apparent misinterpretation." The disputed union proposal appeared to require the filling of bargaining unit positions only through a negotiated promotion procedure, and the agency had objected that this interferred with its right to select from any appropriate source, including Office of Personnel Management registers.

Contrary to the Army's interpretation, the Authority denied finding that the proposal would require the agency to evaluate, rate and rank all candidates from all appropriate sources along with internal candidates and then to select only from that group of candidates.

Rather, said the Authority, its decision was based on the interpretation that the competitive procedures in the promotion plan would identify candidates who would be considered first. As such, it did not conflict with management's right ultimately to select directly from any appropriate source under 5 USC 7106(a)(2)(C).

The Authority's refusal to reconsider *6 FLRA No. 96* was issued on April 12, 1982.

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Make-Up Time for Religious Holidays

Casefacts: The tax assistant with the Internal Revenue Service at the Brookhaven Service Center had taken compensatory time to observe religious holidays in February and April. He made some of this up, but still owed six hours of the compensatory time advanced him. He then voluntarily accepted the center's general offer to do Saturday overtime work in mid-April.

Early the following week his supervisor advised him that due to his outstanding balance of religious compensatory time, six of the eight hours he worked could be charged to his compensatory leave, or he could choose to convert his six hours of compensatory leave to annual leave, in order to be paid the overtime rate for the full eight hours worked.

The employee took the second option, then grieved. The National Treasury Employees Union served as his representative.

Exhibits at the arbitration hearing included an IRS-NTEU memorandum of understanding concerning overtime work to repay time lost because of observance of a religious holiday. The memorandum, negotiated at the national level, provides that:

> "A grant of compensatory time off will be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time (generally 120 days). If within that time an appropriate time for repayment has not been mutually agreed upon, Management may direct the employee to perform the compensatory overtime work at the Service's option."

Shortly thereafter, IRS issued a manual supplement implementing the memorandum. A month later the center issued a personnel management release on the same issue. The Brookhaven directive reads, "Where overtime is available and it is worked, compensatory time must be paid back before the employee is paid at an overtime rate."

The foregoing documents were prompted by a 1978 Congressional enactment that a federal employee who misses work because of a religious holiday "may elect to engage in overtime work for time lost for meeting these religious requirements." The statute adds that "Any employee who so elects such overtime work shall be granted equal compensatory time off . . ."

NTEU contended that the local directive, which had not been negotiated, violated the national memorandum of understanding. The activity maintained that its directive had been announced in the release, that NTEU was well aware of it, and that the grievant should have been aware.

Issue: Did management violate the national memorandum of understanding by refusing to permit the grievant to draw overtime compensation for work performed on Saturday?

Award: Arbitrator James M. Harkless denied the grievance.

The facts showed that the grievant was granted advance compensatory leave to observe certain religious holidays. As he took them he thereby became indebted to the agency either to work off the leave during overtime or convert it to annual leave. It was true that under the memorandum of understanding he had 120 days to work it off when he chose, provided the employer agreed to those times. If he failed to do so, the memorandum acknowledges management's right to determine when he would be required to work the overtime.

The parties agreed that a basic purpose of the memorandum was to protect employees from being forced to work within the 120 day period to pay back the compensatory leave.

By the same token, the arbitrator ruled, the union does not claim this provision prohibits management from requiring an employee to work overtime during the 120 day period, so long as he/she retains the option of whether that overtime will be used to pay off any advanced compensatory leave.

The arbitrator found the memorandum of understanding silent on whether an employee who received advance compensatory leave for religious observances must pay it back when he/she voluntarily works overtime. The parties had reported that there was no discussion of this during negotiations. Thus, the essential question became whether the center's directive conflicts with the basic intent of the memorandum of understanding.

Arbitrator Harkless judged that it did not. Under the Brookhaven directive, employees still retain the right to determine *when* they will work overtime to pay off compensatory leave. All that the directive does is to require that the compensatory leave be paid back, once the employees exercise that option. Nothing in the memorandum or the parties' discussions leading up to it ruled this out.

Consequently, he said, he was unable to find that the agency violated the memorandum of understanding or the IRS manual supplement. *(Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union—October 16, 1981. LAIRS #13704)*

The Labor-Management FORUM

Traditional Work and New Technology

A union cannot propose that employees will continue to be assigned their traditional and historical work in the event of technological changes, the Federal Labor Relations Authority said, because it conflicts with management's right to assign work. Another section of the proposal requiring the agency to provide training to keep employees abreast of new technologies so they could maintain equipment for which the unit was traditionally responsible was also found nonnegotiable.

In a second proposal the International Brotherhood of Electrical Workers called for management to negotiate the establishment of retraining programs if there were a RIF so employees could meet qualification standards for other positions. The Authority ruled that this proposal was bargainable since it did not mandate the retraining of any employee.

A third IBEW proposal was held negotiable only at the option of the employer—the Government Printing Office. Even though the proposal reflected current GPO safety practices on crew size and assignment of certain employees, it nevertheless limited the numbers and types of employees management could use in specified situations. The Authority upheld the agency's decision not to bargain. *(8 FLRA No. 35—March 10, 1982)*

Unfair Practice at BATF

The union did not need to present specific proposals for a meeting to constitute negotiations, the Federal Labor Relations Authority ruled, and management erred by refusing to grant official time, travel and per diem to the labor representatives. The unfair labor practice occurred, according to the administrative law judge's findings, when the Bureau of Alcohol, Tobacco and Firearms and the National Treasury Employees Union representatives met to discuss the impact and implementation of a proposed Bureau realignment.

The Bureau lost its argument that the meeting did not amount to a bargaining session because the union had not made specific demands and the discussion did not lead to a written agreement. *(8 FLRA No. 70—March 26, 1980)*

Arbitration Award Sustained by FLRA

Contrary to the union's position, where the agreement's grievance procedure specifically excludes promotions to non-bargaining unit positions, enactment of 5 USC 71 did not automatically extend coverage to these grievances. This ruling by the Federal Labor Relations Authority upheld an award by arbitrator Tim Bornstein in a case involving the Portsmouth Naval Shipyard and the International Federation of Professional and Technical Engineers.

The IFPTE's argument was based on the premise that the contractual limitation of merit promotion grievances to unit positions was rendered obsolete by the 1978 statute. In the union's view, an oral agreement by the parties to read their agreement in a manner consistent with the new law automatically broadened the scope of the grievance procedure.

The arbitrator rejected this contention, finding that the law, with certain exceptions, did not change or revise contracts negotiated before its passage. He accordingly found the grievance non-arbitrable.

The Authority agreed with the arbitrator, noting that grievance procedures must be negotiated, and that "mere objection by a party to the continuation of existing negotiated grievance procedures would not, *per se*, extend the scope of existing procedures." *(8 FLRA No. 54—March 24, 1982)*

Casual Chat Not a Formal Meeting

When an employee stopped his Army supervisor to ask a few questions regarding changes in the tour of duty, this was a casual meeting, not a formal discussion, the Federal Labor Relations Authority's administrative law judge said, and the activity was under no obligation to offer the union an opportunity to be present. The Army did, however, bypass Local R14-89, National Association of Government Employees by distributing a memorandum soliciting employee views on the change in tours.

The ALJ determined that the memorandum was an attempt to deal directly with employees on personnel policies. The action disregarded and derogated the right of the exclusive representative to function on behalf of unit employees.

He also concluded that, contrary to NAGE's complaint, the employer had offered to bargain with the union on the impact and implementation of the change in tours. Due to the leave status of its president, the local did not make itself available to negotiate until shortly before the effective date of the change. Although sympathetic to the desire of employees to take leave, "the business of the government must go on, and unions must be able to function continuously as well," the ALJ said.

Since no exceptions to the ALJ's decision were filed, his findings constitute, without precedential significance, those of the Authority. *(6 CA-862—March 26, 1982)*

No Official Time for Non-Unit Employee

Management did not commit an unfair labor practice when it refused to grant official time to an employee outside the bargaining unit to participate in negotiations, the Federal Labor Relations Authority ruled. The employer was, however, unfair in its refusal to permit the non-unit employee to negotiate while in leave status or off duty. It also committed a ULP by refusing to accept the same employee as the union's representative on a EEO committee.

The ruling upheld two of the three complaints filed by Local 2924, AFGE against the Davis-Monthan Air Force Base in Tucson, Arizona.

The employee in question had been promoted out of the AFGE unit and into a unit represented by another union, Local 81, NFFE. NFFE asked the activity to deny the employee a role as negotiator "and compel AFGE to use its own negotiating resources and cease and desist their poaching of NFFE resources."

Management in turn notified AFGE that the non-unit employee would not be admitted to the bargaining session because NFFE's request was within its rights as exclusive representative. On the same grounds the Air Force struck the employee's name as AFGE nominee for the EEO committee.

The Authority concluded that the Air Force had no obligation to grant official time to an employee who was not a member of the unit. Concerning the other two complaints, management's desire to maintain a neutral stance interferred with AFGE's rights to negotiate and to designate its representatives. *(8 CA-432 and 8 CA-671—March 26, 1982.)*

The Sound of Music

Management was justified in halting the habit of some employees of listening to portable radios through earphones, according to the Federal Labor Relations Authority. Contrary to the union's assertion, there was no established past practice and hence no unilateral change in conditions of employment by the Internal Revenue Service.

Over a two year period, three different swing shift supervisors allowed about 11 employees (out of 40 in the section) to listen to radios and tape recorders at various times and for various periods. Then the activity reaffirmed a long-standing policy prohibiting the playing of these devices at work stations.

The Authority's administrative law judge outlined criteria for past practices. They generally include all conditions of employment not specifically covered in the collective bargaining agreement which are followed by both parties, or followed by one party and not challenged by the other party over a period of time.

Past practices may also include the actual practice being followed, regardless of the contractual agreement. To constitute the establishment by practice of a term and condition of employment, the practice must be consistently exercised for an extended period of time with the employer's knowledge and consent.

The ALJ found that the General Counsel failed to prove by a preponderance of evidence that the alleged past practices met these criteria.

Since the ALJ's decision was not contested, it was adopted without precedential significance by the Authority, and the unfair labor practice complaint was dismissed. *(Case No. 7 CA-849—April 22, 1982)*

Court Won't Review Ruling in Arbitration Case

The U.S. Court of Appeals for the Fourth Circuit has declined to rule on a union's appeal from the modification of an arbitration award by the Federal Labor Relations Authority, saying it lacks jurisdiction. The court noted that arbitration awards are not subject to judicial review unless they also involve an unfair labor practice.

The Authority had deleted from the award a requirement that the Social Security Administration must negotiate on the establishment of performance standards and the identification of critical elements. The Authority let stand that part of the award ordering SSA to negotiate with Local 1923, AFGE on various other aspects of performance appraisal systems.

The grievance arose over whether the agency had a duty to bargain on the systems. The union had two possible avenues of redress: it could file a ULP complaint, or it could grieve management's refusal to bargain as called for by the contract.

Because AFGE opted to take the grievance route, neither the arbitrator nor the Authority had decided a ULP charge. Consequently, the Fourth Circuit concluded, the case was not within its jurisdiction. *(USCA Fourth Circuit No. 81-1583, April 13, 1982)*

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FLRA's "Acting at All" Standard Is Sustained by Appeals Court

The Federal Labor Relations Authority's determination that the agency had a duty to bargain over a union proposal concerning procedures to be followed in taking personnel actions where those procedures would not ultimately prevent the agency from taking the personnel actions was upheld on appeal to court. The U.S. Court of Appeals for the Eleventh Circuit said the Authority's "acting at all" standard draws a reasonable balance between management rights and union rights to negotiate procedures. *(USCA Eleventh Circuit No. 80-5938, May 3, 1982)*

The court was not persuaded by arguments of the Veterans Adminiatration Medical Center, Tampa, Florida that it should not have a duty to bargain when the proposed procedures would "unreasonably delay" its ability to make personnel decisions. The judicial decision noted that it was relying on a sister court ruling in a similar case, the *Dix-McGuire Exchange case.*

Hold the Mustard

The Office of Personnel Management must bargain on a union proposal requiring it to "take whatever action it can to ensure that prices in the cafeteria do not rise faster than the income of employees," the Federal Labor Relations Authority ruled. The proposal also calls for OPM to post percentage price increases on a bulletin board outside the cafeteria.

OPM had maintained that the proposal by Local 32, AFGE was not negotiable because it concerns matters outside the agency's discretion, and is inconsistent with government-wide rules and regulations.

OPM described the proposal as mandating it to bargain over the setting of prices charged by the cafeteria. Only the General Services Administration administers the contract for food services in the agency's office building, and only GSA has authority to influence the prices and services, OPM said.

The Authority commented that OPM misinterpreted the proposal as requiring it to bargain over food prices. In the Authority's view, the proposal merely requires OPM to take what action it can within its lawful discretion to control the rise of cafeteria prices.

Nothing in the law limits the duty to bargain to matters over which an agency has *total* discretion, FLRA observed. Unless otherwise provided by law or regulation, an agency must bargain on matters affecting conditions of employment to the extent that it has discretion, including an agency's appropriate requests to third parties for necessary action to implement an agreement.

This obligation to negotiate does not extend to proposals which would require changes in existing laws or regulations, according to the ruling. *(8 FLRA No. 87—April 30, 1982)*

DOL Lawyers' Unit Held Inappropriate

A group of attorneys who administer provisions of the Federal Service Labor-Management Relations Statute does not constitute an appropriate bargaining unit. This ruling by the Federal Labor Relations Authority dismissed a petition filed by nonsupervisory lawyers in the Office of the Solicitor at the Labor Department. The Authority noted that functions of the Solicitor include handling cases on standards of conduct for unions in the Federal sector. *(8 FLRA No. 68—March 26, 1982)*

Authority Overturns Arbitration Award

An arbitration award which denied a management grievance on the grounds that a negotiated pre-charge unfair labor practice procedure was illegal has been set aside by the Federal Labor Relations Authority.

The negotiated procedure called for Local 2154, AFGE to submit ULP charges to top management for possible resolution before filing them with the Authority. The procedure followed an Authority regulation expressly encouraging parties to resolve ULP allegations informally and voluntarily. When the union failed to do so, Fort Sam Houston, Texas grieved.

Arbitrator Ernest E. Marlatt questioned the Authority's power to adopt such a policy. He concluded that the procedure, despite its support in FLRA regula-

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The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration

The Pork Chop Caper

Casefacts: As she was leaving the Veterans Administration Medical Center, the food service worker saw some 15 cooked pork chops in a garbage can. Deciding that her dog would like the meat, she scooped out four chops and put them in a bag. When she got outside the building, she was stopped and searched by the security police. The worker was subsequently charged with theft of government property, and fired.

The American Federation of Government Employees argued that an employee with 15 years of service should not be dismissed for four small pieces of garbage. This was but a small portion of a large amount of food thrown away that evening. Had she not taken the chops, they would, within a matter of minutes, have been emptied from the can into a dumpster.

The union pointed out that the grievant knew the police were outside searching employees but made no attempt to get rid of the chops or transfer them to her purse, although the police were not searching handbags. She willingly consented to the search because she was unaware that she could be in trouble for taking garbage.

According to AFGE, for 26 years it was the center's policy to charge the cost of food to employees taking it, and perhaps to admonish the employee. This past practice was followed many times, yet in the grievant's case it was changed without warning.

The VA explained that its action was not a hasty decision, but one of careful consideration based on the grievant's past record. The center had been extremely tolerant of her past conduct, using the progressive discipline process. She had been counseled, admonished, reprimanded and twice suspended. The discipline failed to alter her conduct, and after the latest charge management had no other choice but to remove her. Her removal was in the best interest of the hospital, and promoted the efficiency of the service.

Under VA regulations, when an employee has committed a series of offenses, a greater penalty than is listed for a single offense is appropriate. Normally, more severe penalties are to be administered before removal action is initiated. Other rules prohibit the use of government property for other than officially approved activities.

The employer asserted that the possibility exists that if employees know it is permissible to take home food thrown in the trash, patients may be deprived of essential food by an employee's setting aside portions of food for "disposal."

"The moment management loses its authority to control quantity and distribution, and loses its authority to enforce policy and issue disciplinary actions, the effectiveness and efficiency of government operations will be totally lost," the VA maintained.

The VA introduced as an exhibit the minutes of a staff meeting at which the chief of dietetics warned, "It is each employee's responsibility to protect government property. Even leftover food is government property, the same as supplies. We are not authorized to eat or take home anything, not even garbage. If anyone is doing this, you will be subjected to disciplinary action. It would be a shame to lose a paycheck, perhaps permanently, over a little sack of nothing." The union objected to this exhibit, claiming there was no proof workers ever saw a copy.

As to the grievant's prior discipline, AFGE said, it was based on absenteeism due to alcoholism. At the time of the alleged theft she was in an employee assistance program. Under the agreement, employees enrolled in the program are not to be subject to discipline as a result of their problem, as long as no criminal action is involved, until they are given reasonable time and opportunity for rehabilitation. None of the grievant's prior offenses involved theft.

Issue: Was the discharge of the grievant justified?

Award: Arbitrator Ernest M. Hathaway reduced the penalty from "Removal" to "Suspended without pay for 15 working days."

He noted that an arbitrator should not properly substitute his judgment for that of management where the exercise of management's judgment is not prohibited by the contract, or is not a clear abuse of discretion. In the circumstances of this case, however, he was convinced that the grievant's removal from employment was neither considerate nor conducive to a more harmonious labor-management relationship, nor would it promote the efficiency of the agency. He saw no reason to fear that the reinstatement would create any threat to future agency discretion.

Arbitrator Hathaway took into consideration the fact that the breaking of a rule for the first time was not in the past considered sufficient grounds for removal. The agreement's provision on the employee assistance program was another factor to be considered.

The food service worker had made a serious mistake, and should have been aware that leftover food was not to be taken home. Management must be strict in its interpretation of theft, and the grievant should be punished in some manner. For these reasons, he reinstated the grievant but imposed the suspension. *(VA and AFGE October 19, 1981. LAIRS #13983)*

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The Curious Case of the Copper Coins

No employee rights were violated when U.S. Secret Service agents denied the union's request to participate in a criminal investigation of a Bureau of the Mint employee. So ruling, the administrative law judge of the Federal Labor Relations Authority dismissed charges by the union that the Mint violated the employee's Weingarten rights.

The investigation concerned misstruck coins which have great value as collector's items. When several such pennies were found in the employee's possession, a Mint management official called in the Secret Service. At the same time the official told the employee that he might be questioned, and that he was entitled to union representation at an investigatory interview which might result in disciplinary action. In response to the employee's request, management called Local 695, AFGE.

When the union steward arrived, the Secret Service agents refused to admit him to the interview. The agents also read the employee his Miranda rights and would have allowed an attorney to attend the meeting.

Although the Justice Department subsequently decided not to prosecute the employee, a copy of the Secret Service report was sent to the Mint. The Mint, on the basis of its own investigation, discharged him.

The ALJ found that while both the Mint and the Secret Service are within the Treasury Department, the Service is an independent bureau, and its agents are not representatives of the Mint. The Service is entirely autonomous in the conduct of any investigation under its statutory authority.

He concluded that where there is a separate cause of action—possible violation of the criminal code—and the Secret Service as investigating authority is wholly separate and independent from the Mint as employing agency, the Mint has no authority to control the manner in which the Secret Service conducts its investigations. Accordingly, the employer did not violate 5 USC 7114(a)(2)(B). *(Case No. 7 CA-876—April 30, 1982)*

Arbitration Award Reversed by FLRA

An arbitration award finding the matter arbitrable and resolving the question of whether the electronics technician worked on a system or a subsystem was contrary to law, the Federal Labor Relations Authority asserted, and it reversed the award. The Authority pointed to section 7121(c)(5) of 5 USC 71 which excludes from a negotiated grievance procedure any grievance concerning the classification of any position which does not result in the reduction in grade or pay of any employee.

The Authority agreed with the Federal Aviation Administration that the essential nature of this particular grievance went beyond the accuracy of the grievant's position description and clearly concerned the question of whether the position was accurately classified.

According to the FLRA, Arbitrator Roger C. Williams, while ostensibly ruling on the accuracy of the position description and sustaining the grievance, in fact rendered a classification decision.

The Authority cautioned that its decision was limited to the particular facts of this case. In no manner does it prevent arbitral review of grievances on the accuracy of an employee's official position description, including whether the assigned duties are accurately reflected by the description. Nor does the decision prevent an arbitrator from ordering an agency to change the description if the agency has decided to add unrelated duties to the position to be regularly performed by the employee.

Such an order would be proper, the FLRA added, because it does not directly concern position classification even if the change in the description results in a classification appeal or a reclassification of the position. *(8 FLRA No. 103—May 13, 1982)*

NFFE Proposals Get Mixed Reception

Ordering the Social Security Administration to bargain on the first union proposal, the Federal Labor Relations Authority found part of the second proposal violated management's right to discipline. The proposals were presented by the National Federation of Federal Employees.

The first proposal would establish a NFFE right to solicit membership during non-work time in non-work areas. A non-work area meant a work area if no employees were working. The Authority held that to the extent the proposal provided that solicitation could occur during time periods for which management had determined the performance of job functions was not required, i.e., paid free time, it was negotiable.

NFFE's second bid obligated management to meet with the union representative before disciplining her/him for inappropriate behavior while engaging in union activity. If not resolved, SSA would next discuss the matter with a higher union official. If still not settled, management must obtain a ruling from the Authority prior to imposing discipline.

The first two sentences were bargainable, the Authority concluded, but not the third. Such an advisory opinion would impose upon the agency's right to discipline a condition which SSA could not meet, and effectively prevent the employer from taking the action at all. *(8 FLRA No. 85—April 30, 1982)*

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tions, abridged the statutory right of employees to file ULP charges with the Authority. The arbitrator accordingly denied the grievance.

The Authority overturned the award. Contrary to the view of the arbitrator, it said, the statute in no manner prohibits negotiation of this type of procedure, and employee rights are not involved. *(8 FLRA No. 81—April 30, 1982)*

Justice Is Unfair

The administrative law judge determined that the Justice Department should have offered the union an opportunity to bargain before announcing a computer trainee position at the GS-6 level. Because the agency's action altered its past practice of two years whereby the trainee position was always filled at a GS-4 or GS-5 level, it constituted an unfair labor practice, said the ALJ.

Since no exceptions were filed to the ALJ's decision, the ruling became that of the Federal Labor Relations Authority and has no precedential significance. *(6 CA-675—March 19, 1982)*

Army Found Not Guilty of ULP Charge

A supervisor's questions on what the employee was grieving about, whether phrased as "What led up to this" or "Why did you go this route," did not interfere with the employee's right to grieve, the Federal Labor Relations Authority decided. "A grievance meeting is not so sterile" that asking these questions becomes an unfair labor practice, according to the Authority.

Similarly, the supervisor's statement of her decision to move the employee's desk some six or seven feet, whether the grievant liked it or not, or in spite of the presence of the union representative, did nothing to suggest "inefficacy of such representation," as the FLRA's General Counsel asserted. This was simply a statement of management's decision to exercise a management right.

The Authority accordingly dismissed the ULP complaint filed by the employee against the Army and Air Force Exchange Service, Fort Carson, Colorado. *(8 FLRA No. 94—April 30, 1982)*

Panel Settles SSA-AFGE Impasse

An order by the Federal Service Impasses Panel has ended the bargaining stalemate between the Social Security Administration and Local 1760, AFGE. The dozen issues concerned the adverse impact on 200 unit employees resulting from the relocation of a SSA office in New York City.

The Panel directed adoption of the union's proposals on the preamble and fire inspection, and of the employer's proposals on water coolers, parking, noise abatement, and copies of the contract. It rewrote and modified proposals on unsafe worksites, restrooms, and compliance. The Panel also told both parties to withdraw their proposals on smoking and miscellaneous items, and AFGE to withdraw its proposal for a lunchroom. *(Case No. 81 FSIP 122—April 1, 1982)*

Union Loses Bid for Stay of ULP Order

Denying the union's request for stay of a remedial order, the Federal Labor Relations Authority told the National Treasury Employees Union to reinstate the shop steward. The order had found the union guilty of an unfair labor practice by removing the steward from his position in retaliation for giving testimony at an FLRA hearing which was damaging to a NTEU president's assertions.

According to the Authority, it was not demonstrated by a preponderance of evidence that the steward would have been removed even if he had not testified. NTEU's action interferred with employee rights under 5 USC 7116(a)(1). *(2 CO-3—March 19, 1982)*

Conference Schedule

Sponsored by the Federal Mediation and Conciliation Service, "The National Labor-Management Conference: A New Era in Meeting Mutual Needs" will be held September 9-10 at the Shoreham Hotel, Washington, D.C.

In addition to top level speakers from unions, management and government, there will be 24 special sessions highlighting such areas as how to improve labor relations, productivity, quality of work life, and other successful cooperative labor-management efforts in the private and public sectors. The National Association of Area Labor-Management Committees is assisting FMCS with the conference.

The registration fee is $50. For further information contact either Peter Regner, FMCS, 2100 K St. N.W., Washington, D.C. 20427, (202) 653-5320, or Patricia Presley, NAALMC, P.O. Box 1398, Cumberland, MD 21502 (301) 777-8700.

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Authority Modifies Two ALJ awards

In two separate unfair labor practice decisions issued on May 13, the Federal Labor Relations Authority held that *status quo ante* remedies were inappropriate since the impact of the employers' decisions on workers within the bargaining unit was minimal. In one decision the Authority outlined criteria for determining the appropriateness of such remedies. (A *status quo ante* remedy returns the parties to the existing state of things prior to the unfair practice.)

Correctional Institution Decision

In the first decision, *8 FLRA No. 111*, Local 2052, AFGE charged the Federal Correctional Institution, Petersburg, Virginia with refusing to negotiate the impact and implementation of proposed changes in staff assignments. The changes involved the relocation of a correctional officer, the assignment of one officer to cover two dormitories when previously there was one officer per dormitory, and the addition of a position.

Although the Authority's administrative law judge found the agency unfair in its failure to negotiate, he did not order a *status quo ante* remedy. This remedy would not be proper, he said, since management's decision was nonnegotiable. The Authority sustained his finding that a ULP was committed, but modified his remedy.

Criteria for *Status Quo Ante* Remedies

The Authority held that the appropriateness of a *status quo ante* must be determined by balancing the nature and circumstances of the particular violation against the degree of disruption in government operations caused by such a remedy. Among the criteria to be considered are: whether and when the agency notified the union concerning the action or change; whether and when the union requested bargaining on the procedures for implementing the action or change; the willfullness of the agency's conduct in failure to discharge its bargaining obligations; the nature and extent of the impact on adversely affected employees; and whether and to what degree a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

In this case the Authority found that only a few of the 110 bargaining unit employees were directly affected by the changes, and impact on them would be minimal. Accordingly, instead of issuing a *status quo ante* remedy, the Authority ordered the employer to bargain with the union on the changes.

Fort Sam Houston Decision

In the second decision, *8 FLRA No. 112*, the FLRA found that Fort Sam Houston, Texas committed a ULP when it failed to bargain on the impact and implementation of its decision to create a new position and to change the duties of existing positions. No *status quo ante* remedy was awarded since the decision did not cause a loss in grade or pay and had minimal impact on the unit. The Authority directed the agency to bargain on the impact and implementation of its decision.

Also at issue was an ALJ finding that the employer failed to give Local 2154, AFGE adequate notice of a reduction-in-force. The Authority modified the ALJ's award, observing that the agency had given the union timely notice that a meeting would be held in five days to hand out RIF letters. The union was invited to attend the meeting and to refer questions to a staffing specialist. Despite this, AFGE did not request negotiations or attend the meeting. The Authority dismissed this complaint.

Negotiability Rulings

Three issues were found negotiable and one issue nonnegotiable in a recent decision by the Federal Labor Relations Authority. Parties in the case were the Warner Robins Air Force Logistics Command, Georgia and Local 987 of the American Federation of Government Employees.

The first proposal found negotiable would require management to use full-time employees to the fullest extent possible, and use part-time employees only when it was not practical or prudent

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PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Congressional Conflict at Library

Casefacts: The grievant, an employee at the Congressional Research Service of the Library of Congress, was planning to attend the 1980 Democratic Convention. When management became aware of her intention to attend the convention, a meeting was held. At the meeting, it became known that the grievant was a prospective delegate to the convention. This raised the question for management as to whether or not her activity could be considered a conflict of interest.

The Library's Office of General Counsel issued an opinion which asserted that the grievant's attendance at the convention as a voting delegate would create a "possible conflict of interest and the appearance of a conflict of interest." The grievant was advised of the General Counsel's opinion; nevertheless, she attended the convention as a delegate. Upon her return, management disciplined the grievant by transferring her to another position for a year, during which time she would not be under consideration for a promotion. The employee grieved the transfer.

The Library argued that the grievant was fully aware of the consequences of her actions, and that those actions constituted insubordination. Management cited an agency regulation allowing the Library to prohibit or limit employee participation in an activity which would interefere with the performance of official duties, or create a conflict or apparent conflict of interest. The Library contended that her attendance at the convention as a delegate created such a conflict of interest.

The agency noted that, as a delegate, the grievant would be involved in the selection process of a presidential candidate, as well as the formulation and adoption of a partisan platform for a political party. The grievant's job required that she perform research, prepare reports and directly advise members of Congress, their staff, and committees of the Congress on matters of interest to them in the performance of the work of the Congress. She received recognition for her work and advice because her name was included on her writings, and she had direct communications with members of Congress.

The Library argued that since the names of delegates are known to the public and they may publicly advocate an issue or candidate, it could be reasonably inferred that delegates have a substantial interest in the success of a candidate and the platform positions they adopt. Thus, the agency contended that "Congress could have well-founded misgivings about whether or not an analyst who served as such a delegate was providing it with unbiased material or advice." This situation, in management's opinion, created a possible conflict of interest and the appearance of a conflict of interest.

The grievant argued that no conflict of interest was created by her being a delegate to the Democratic Convention. She contended that agency regulations permit her to participate in political conventions. Further, employees of the Library of Congress are not under the statutory proscriptions of the Hatch Act, and the purpose of the elimination of the Act's restrictions was to encourage all employees to engage freely in voluntary partisan political activities during their free time.

Issue: Did management have cause to discipline the grievant for insubordination for attending the convention as a delegate?

Award: Arbitrator Joseph A. Sickles upheld the agency's action, and denied the grievance. He noted that while agency regulations permit attendance at political conventions, other regulations permit the agency to restrict certain activities. Consequently, the Library must demonstrate that the exception in this case was reasonable, and that the exception and its basis were conveyed to the employee within a reasonable period of time prior to departure for conventions.

He noted that while the agency had generally been rather liberal with its interpretation of the question of permissible political activities, when this issue arose it was the subject of scrutiny by the agency. The grievant was warned that the activity might be questionable, and later specifically told that it was not a permitted activity. Further, the grievant decided to ignore the instructions of her supervisor, who had told her that if she persisted in attending the convention as a voting delegate, she might be subject to disciplinary action.

The arbitrator ruled that the Library had the authority to limit the grievant's participation as a voting delegate, and that the grievant made the decision to participate with full knowledge of that determination. Therefore, the agency had cause to discipline the grievant for insubordination for participating in the convention as a delegate *(The Library of Congress and Congressional Research Employees Association, October 30, 1981. LAIRS # 13829.)*

The Labor-Management FORUM

No Pay When Waived

Management's refusal to pay the travel and per diem expenses of employees representing the union in contract negotiations was held by the Federal Labor Relations Authority not to constitute an unfair labor practice since the union had clearly waived its right to such payment.

In August 1979 the Nuclear Regulatory Commission and the National Treasury Employees Union agreed on ground rules for conducting negotiations of the parties' contract. One of the ground rules provided that "no per diem or travel expenses will be paid by the Employer to members of the Union team."

Earlier that year, the FLRA had announced that an interpretation of the Federal Service Labor-Management Relations Statute was warranted on the issue of whether employees on official time while representing unions in negotiations were entitled to payment from agencies for their travel and per diem expenses, and invited comments. In December 1979 the Authority issued a major policy statement which provided that agencies must pay travel and per diem to employees who are union representatives when engaged in negotiations.

Subsequently, NTEU requested that NRC reimburse its negotiating team for these expenses. The agency refused the request on the basis of the previously negotiated ground rules. This led to the filing of a ULP charge by NTEU.

The FLRA dismissed the complaint. The Authority noted that entitlements to travel and per diem payments may be waived by clear and unmistakable conduct. It also noted that the parties specifically agreed on written ground rules in which NTEU had waived its right to the payments.

The Authority further noted that the ground rules were agreed upon at a time when the union had notice that the Authority was considering the question of travel and per diem payments. Under these circumstances, the FLRA ruled that NTEU had made a clear and unmistakable waiver of the negotiating team's entitlement to the payments (*8 FLRA No. 124—May 20, 1982*)

Win Some, Lose Some

The Federal Labor Relations Authority issued a series of negotiability determinations on issues arising in agreement negotiations between the Office of Personnel Management and Local 32, AFGE.

The Authority found negotiable a proposal requiring that negotiated promotion procedures be used in filling positions. The FLRA rejected OPM's contention that the proposal was intended to apply to nonbargaining unit positions. The proposal was construed to apply only to bargaining unit positions, even though it did not expressly state that the procedures apply only to bargaining unit vacancies.

A proposal mandating the employer to create a single certificate of the best-qualified applicants from all sources and to select only from that list was found to be nonnegotiable. The Authority held that the express intent of the proposal would preclude OPM from making selections from other appropriate sources.

Found negotiable was a proposal that would require a career ladder promotion when an employee met the qualification requirements and demonstrated the ability to perform at the higher level. FLRA held that a career ladder promotion is the direct result of the agency's decision to select and place an employee in a career ladder position.

The Authority also held that the selection and placement of an employee in a career ladder position "constitutes the agency's decision to promote that employee non-competitively at appropriate stages in the employee's career up to the full performance level of the position, once the requisite conditions have been met." Thus, a career ladder promotion, as referenced in the proposal, would merely be a ministerial act implementing the agency's earlier decision to select and place the employee in a career ladder position.

Upward Mobility

Held nonnegotiable was a proposal calling for OPM to fill a specific number of positions through the upward mobility program. This was inconsistent with the agency's right to hire and assign employees, the Authority said.

The FLRA found negotiable a proposal under which a selecting official must either make a selection within two weeks after receiving a certificate or cancel the vacancy. The Authority held that the proposal would establish a procedural time limit to fill a position from a particular certificate of candidates. Further, it would not prevent OPM from considering or selecting a candidate from any other source; nor would it require a selection from the certificate, or prevent management from reannouncing the vacancy.

The final proposal, which required management to select repromotion eligibles except where there were "persuasive reasons" for not selecting, was found not negotiable. The Authority held that the phrase "persuasive reasons" was not intended to include such reasons as management's decision not to fill or to abolish the vacant position or to select a better qualified candidate from any appropriate source. The proposal accordingly interfered with the agency's right to choose among candidates from appropriate sources in filling a vacancy. (*8 FLRA 97—May 7, 1982*)

BOOKSHELF

Spot Reviews of Publications and Films

OPM's Office of Labor-Management Relations has issued a new reference publication summarizing third party decisions in the Federal sector. It is the *Index of Federal Labor Relations Cases, October 1981.*

The cumulative index contains all arbitration awards and all decisions of the Federal Labor Relations Authority and Federal Service Impasses Panel, as well as relevant decisions of the Merit Systems Protection Board, the Comptroller General and the courts. In addition, it includes all rulings of the Federal Labor Relations Council and the Assistant Secretary for Labor-Management Relations issued under Executive Order 11491, and selected decisions of the former Federal Employee Appeals Authority. There is also an alphabetical listing of subjects.

The *Index* may be ordered from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, telephone 703/557-4693. The purchase number is PB 82-20873. It is priced at $31.50 for a paper copy, and $4.00 for microfiche.

(Continued from page 1)

to use full-time employees. The Authority held that the requirement "would establish a general, non-quantitative contractual requirement by which management's use of part-time employees could be evaluated in a grievance by a full-time employee who believes he or she has been adversely affected by the Agency action."

Citing an earlier decision, *4 FLRA No. 66*, the FLRA said the proposal was negotiable since it did not interfere with management rights but would establish an appropriate arrangement for employees adversely affected.

A Tip Offset

The second proposal found negotiable would establish a tip offset for nonappropriated fund employees who earn more than $30 per month in tips at no more than 10 percent of the minimum wage.

The FLRA noted that under the Fair Labor Standards Act, when an employee regularly receives more than $30 a month in tips, the employer is allowed to deduct from the pay owed the employee up to 40 percent of the applicable minimum wage, and that the specific percentage to be used for this tip offset is left to the employer to determine. The Authority also noted that no law or regulation precludes the agency from either unilaterally or through negotiations adopting the 10 percent tip offset. Since the determination is within the agency's discretion, and no law or regulation precludes bargaining, the FLRA found the proposal negotiable.

Seniority and Bumping

The third negotiable proposal would require that first consideration on any reassignment or bumping right or separation where more than one employee is involved must be based on skill requirements and total length of service as an Air Force nonapproriated fund employee.

The Authority found that Federal law requiring "agencies to use the results of performance appraisals as a basis for retraining and removing employees" does not preclude negotiations on this proposal since the law specifically exempts nonappropriated fund employees from its coverage. Further, the FLRA found that the absence of performance as a factor in a reduction-in-force retention system cannot be the basis for alleging violation of a merit system principle in 5 USC 2301(b)(6) even if it were determined that the merit principles apply to nonappropriated fund employees.

Management's contention that a compelling need existed for an agency regulation barring negotiations on the proposal was dismissed on the basis that the agency failed to provide affirmative support for this assertion.

Found nonnegotiable was a proposal that would require that existing vacancies within the bargaining unit be utilized to place employees in the event of a RIF. The FLRA held that the proposal would prevent management from considering other appropriate sources of candidates in filling a vacancy. The union had argued that it merely extended to employees a form of priority consideration. *(8 No. 116—May 19, 1982)*

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New Developments Checklist ...

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PATCO Loses Decertification Appeal

A Federal court has held that the Federal Labor Relations Authority "did not abuse its discretion" in voting to decertify the Professional Air Traffic Controllers Organization after its members' illegal strike last year. The court's decision upheld FLRA action stripping the union of its status as bargaining agent for 18,000 controllers. PATCO had appealed the Authority decision.

The ruling of the U.S. Circuit Court of Appeals in Washington followed an investigation of alleged *ex parte* contacts and attempts to influence the votes of Authority members. The court determined that although it "had found one (or possibly two) statutory infringements, we conclude that no parties have been prejudiced by the flaws in the proceedings." *(PATCO v. FLRA, USCA DC No. 81-2135, June 11, 1982)*

Comptroller General Sets New Policy on Back Pay for Overlong Details

Federal employees detailed to a higher level position for more than 120 days are no longer entitled to retroactive temporary promotions, the U.S. Comptroller General says. This new General Accounting Office policy means that workers assigned to higher paying jobs for a lengthy period are not entitled to monetary relief unless an agency regulation or collective bargaining contract specifically mandates a temporary promotion in such a situation.

The change in policy was triggered by a Court of Claims decision *(Wilson v. United States, October 23, 1981)* denying back pay for an overlong detail. Neither the back pay statute nor the Federal Personnel Manual requires the granting of a retroactive temporary promotion and back pay in these circumstances, the court held.

The *Wilson* decision contradicted a long line of rulings by GAO allowing temporary promotions for employees detailed for longer than 120 days if their agencies had not obtained prior approval from the Office of Personnel Management.

The first of these rulings was *Turner-Caldwell* which was based on a 1974 decision by the former Civil Service Commission's Board of Appeals and Review holding that the remedy envisioned in the FPM for an agency's failure to obtain prior Commission approval was a temporary promotion for the employee.

Although GAO notes that it is not bound by claims court rulings, it views the *Wilson* decision as a "reasonable interpretation of law and regulation," and one which "follows a clear line of precedent by the court." GAO says its view is shared by the Justice Department and OPM. For these reasons, GAO decided to drop its *Turner-Caldwell* policy and follow the *Wilson* decision.

The Comptroller General decision advises that all pending and future claims under the *Turner-Caldwell* line of decisions will be denied by GAO. Decisions or settlements of claims issued before May 25 are not affected. *(Comptroller General B-203564, May 25, 1982)*

Will the Real Management Official Please Stand Up?

Only one of the 81 employees in 33 disputed positions is a management official, the Federal Labor Relations Authority determined, and of the 38 incumbents in 11 other disputed positions alleged to be supervisory by Army's Redstone Arsenal, Illinois, only four employees in three positions meet the statutory definition. Thus, only five employees were excluded from the bargaining unit.

The Authority decided that only the incumbent of the Public Information Specialist position, a GS-13, was a management official because "he is responsible for the development of the activity's public information program and for carrying it out. In this regard he works independently and, therefore, effectively influences or brings about a result as to the adoption of courses of action for the activity.

(Continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Candid Camera

Casefacts: One Thursday a union vice president during his non-duty time entered his work area in the heavy automotive repair shop at Fort Bragg, North Carolina and began photographing his fellow workers and their work areas. His purpose in taking the photographs was to identify and document alleged safety violations.

When at least one employee complained to management about the union official's activities, Fort Bragg filed a grievance against Local 1770, American Federation of Government Employees.

The employer essentially contended that it had the right to insist that union officials seek supervisory permission before photographing and investigating alleged safety violations.

AFGE responded that management, in effect, was attempting to represent an employee who complained about a union official's activities. According to the local, this employee should have complained to union representatives, not management, regarding the incident. The union concluded that management was committing an unfair labor practice by attempting to undercut the local in its representational duties.

The employer cited the parties' labor agreement to support its position. Article III emphasizes management's statutory right to direct agency employees.

Section 3 of Article XXII Occupational Health and Safety states that:

"Problems concerning occupational health and safety should first be brought to the attention of the immediate supervisor who will, in consultation with the steward ... determine what action should be taken in order to alleviate a hazard to the health and safety of affected employees. If the matter is not resolved at that level, the supervisor will recommend remedial action to the department head.

"The department head will take immediate necessary action to alleviate the hazardous condition. If the matter is not resolved at that level, the department head will notify the installation safety manager and request assistance on the problem."

Both parties agreed that in the past various employees have taken photographs of work areas without express permission of supervisors, but with their knowledge.

Issue: Did the employer have the right to require a union official to obtain a supervisor's permission before taking pictures during working hours of alleged safety violations?

Award: Arbitrator Robert G. Williams sustained management's grievance.

He observed that management retains the right to supervise and direct the activities of employees during working hours, and that this principle is so well established in collective bargaining that it needed no elaboration.

In addition, Arbitrator Williams said, the parties had agreed upon a procedure for handling alleged safety problems. Article XXII clearly described a system of consultation between a supervisor and a steward for reviewing these matters.

In this case the AFGE vice president made no effort to consult with the supervisor regarding these alleged problems. He undertook an independent photographic mission without consulting the immediate supervisor and following Section 3 procedures.

Management was entitled to insist upon its rights under the agreement which requires union officials to review alleged safety problems in accordance with Article XXII.

The union's contention that management was attempting to represent an employee, thereby infringing upon the union's representation rights, was without merit, the arbitrator concluded. Management was simply attempting to supervise activities in a work area during working hours, and was insisting that the union comply with the agreement.

The fact that one employee's complaint may have alerted management to the problem did not mean that management was attempting to represent that employee.

The arbitrator ordered AFGE to cease and desist from violating Article XXII and to recognize a supervisor's right to direct employees in working areas during working hours. If union officials or employees believe a supervisor had violated the contract, their remedy is to process a grievance. *(Headquarters, XVII Airborne Corps and Fort Bragg and Local 1770, AFGE—February 24, 1982. LAIRS #14013)*

Bench Marks

Miranda Arbitration Award Overturned

The Fifth Amendment privilege against self-incrimination does not apply in a *civil* disciplinary action, according to a decision issued by the U.S. Court of Appeals for the District of Columbia. The ruling set aside an arbitration award which reversed management's suspension of an immigration inspector.

The inspector's discipline for insubordination stemmed from his refusal to write a complete report on an incident involving a complaint against him by a British citizen. When the inspector grieved, the arbitrator reversed the suspension, holding that under the constitution, the U.S. Immigration and Naturalization Service could not order the report without first giving immunity.

The Office of Personnel Management petitioned for judicial review when Arbitrator Barnett M. Goodstein reaffirmed his award. OPM's petition was the first filed under 5 USC 71 by which the director of OPM may appeal to the court if he believes that an arbitration award concerning adverse actions has misinterpreted civil service law, rule or regulation affecting personnel management, and that the award will have a substantial impact on such laws, rules and regulations.

The court found that the constitutional right only protects against disclosures which a witness reasonably believes could be used in a *criminal* prosecution. Since this case concerned a "mere disciplinary matter," the arbitrator erred by invoking the self-incrimination clause to excuse the grievant's behavior. *(Devine V. Goodstein, USCA DC No. 81-1230, June 4, 1982)*

Court Reverses Authority Decision

An appeals court has overturned a Federal Labor Relations Authority decision which held bargainable a union proposal granting Miranda-like rights to employees during discussions with supervisors which might lead to disciplinary action. The U.S. Court of Appeals for the Ninth Circuit found that the Authority's interpretation of 5 USC 7106 in this case was not "reasonably defensible" because it failed to distinguish between substantive and procedural proposals.

The case began several years ago when the International Brotherhood of Electrical Workers proposed to the Navy Public Works Center in Hawaii that employees be granted a contractual right to remain silent during disciplinary investigations, and that the activity be required to inform workers of the right.

Overruling objections by the Navy and OPM as *amicus curiae*, the Authority determined that the proposal did not interfere with reserved management rights, and ordered the employer to bargain *(4 FLRA No. 32-1980)*. The Navy then petitioned for court review of the Authority decision.

The court noted that application of section 7106 "turns on the elusive distinction between *substantive* and *procedural* proposals." (The section establishes management's right to discipline and assign work, but also mandates employers to bargain on procedures used by management in exercising its authority.) The court found defective the Authority's reasoning that the proposal was procedural, adding that to find otherwise would severely erode, if not destroy, management's nonnegotiable authority under the act.

Proposal Obstructs Purpose of Act

Citing the Federal labor statute, the judges observed that the purpose of the act was "to make the government more efficient and accountable." The IBEW proposal, which would significantly relieve an employee of a duty to account to his supervisors, would not carry out this purpose, they said.

Further, to prohibit management from declaring insubordinate an employee who refused to account for his job actions during a disciplinary investigation would reduce the employer's power to discipline employees.

The judges concluded that the disputed proposal extended far beyond the Fifth Amendment right to remain silent, and would eliminate nonnegotiable employer powers.

"The existence of Fifth amendment rights provides to us assurance that our holding does not diminish the civil rights of Federal employees," the opinion stated. "However, we are convinced that the right to negotiate for contractual immunity from discipline for refusing to account to a superior during disciplinary investigations is not one of these rights." *(Navy v. FLRA, USCA Ninth Circuit No. 80-7640 and No. 81-7026, May 25, 1982)*

GC's Decision Is Not Reviewable

A charging party dissatisfied with a decision by the General Counsel of the Federal Labor Relations Authority not to issue an unfair labor practice complaint for prosecution cannot seek court review of the decision. This ruling by the U.S. Court of Appeals for the District of Columbia held that the court has no jurisdiction to review such a GC decision. *(Turgeon v. FLRA, USCA DC No. 81-1778, May 11, 1982).*

(Continued from page 1)

"It follows that this responsibility requires and authorizes him to formulate, determine or influence the policies of the activity ...," FLRA concluded. *(8 FLRA No. 127—May 26, 1982)*

FMCS Director Designated

On June 15 President Reagan announced his intention to nominate Kay McMurray, a prominent arbitrator, as director of the Federal Mediation and Conciliation Service. McMurray, 64, will succeed Kenneth E. Moffett.

From 1972-1977 McMurray was a member of the National Mediation Board, and served as Board chairman for three years. For 18 years prior to that he was executive administrator of the Air Line Pilots Association. He has also been a pilot with United Airlines.

McMurray was graduated from Stanford University with a B.A. in political science in 1940.

Information Please

The agency committed an unfair labor practice by requiring the union to use Freedom of Information Act procedures (FOIA) to request data relevant and necessary to a grievance, the Federal Labor Relations Authority held.

The negotiated agreement between the Bureau of Alcohol, Tobacco and Firearms, Western Region and the National Treasury Employees Union provides that an employee or his/her union representative may review the contents of a promotion file when processing grievances relating to a promotion. The union requested the promotion file used by the agency in order to process a grievance. Three months later management complied with the request, adding that it was supplying the information in response to the union's request made under the FOIA.

The Authority adopted the administrative law judge's ruling that the agency's treatment of the union as a member of the public by requiring NTEU to request information needed to process a grievance under FOIA was a violation of the Federal Service Labor-Management Relations Act.

The ALJ noted that under Executive Order 11491, the Assistant Secretary of Labor for Labor-Management Relations had held that unions were entitled to material requested under the Order, that requests made under the FOIA were incompatible with good faith bargaining, and that the issue was not rendered moot by virtue of the fact that the data was furnished. In several cases the Assistant Secretary ruled that agencies violated the Order by requiring unions to seek information under the FOIA.

The ALJ ruled that the law in this respect had not changed under the labor relations act. He held that the right to data under 5 USC 7114(b) was not controlled by the FOIA. Under this section, agencies are required to furnish the union, to the extent not prohibited by law, with data necessary and available for proper discussion and negotiation of subjects within the scope of bargaining.

The agency was ordered to cease and desist from refusing to furnish to the union information relevant to the processing of a grievance. *(8 FLRA No. 108—May 13, 1982)*

Reading Between the Lines

In its first decision on an unfair labor practice case, the Foreign Service Labor Relations Board ruled that the International Communication Agency attempted to deal directly with employees, thereby improperly bypassing Local 1812, AFGE.

The agency's director had sent a memo to workers noting that their concerns regarding conditions of employment had been heard, and that management would respond with positive action. The memo invited them to convey their views to him directly.

Although the agency may have been motivated by the best intentions, the Board said, "the bilateral nature of the collective bargaining relationship mandates that such dealings be with the exclusive representative rather than directly with employees." *(No. 3-CA-2861 (F)—June 1, 1982)*

The Board, whose chairman is also head of the Federal Labor Relations Authority, was established by Congress in 1980 to deal solely with foreign service personnel and their labor-management relations matters.

Consultant

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New Developments Checklist

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Reuben Named Acting General Counsel of Federal Labor Relations Authority

S. Jesse Reuben has been appointed Acting General Counsel of the Federal Labor Relations Authority. Reuben, in serving as Deputy GC for the past three years, shared in the over-all management of the Office of the GC.

President Reagan's nominee for GC, Lawrence Y. Goldberg, requested last month that his name be withdrawn from consideration.

The post has been vacant since H. Stephan Gordon left last March. Without a legally-appointed GC, the office has been unable to issue complaints in unfair labor practice cases, or make decisions on appeals from the actions of the Authority's regional directors.

What's That Again?

Terming the Federal Labor Relations Authority ruling "self-contradictory," a federal court overturned the Authority's finding that the Air Force Logistics Command erred by not giving the union appropriate advance notice of a proposed reorganization. Although the designated steward had attended an "all-hands" meeting where management announced the reorganization, the Authority declared that the Command failed to notify the steward as *union representative.*

As steward, it was the employee's responsibility to receive notice from the employer of changes in personnel policies and working conditions in his department. After the meeting he was granted permission to review the entire reorganization plan. He found no problem with the plan, and determined that it was not necessary to take any action on behalf of the union.

Later, upon receiving a complaint from an adversely affected worker, the steward re-reviewed the plan. The union then filed an unfair labor practice charge, claiming it was not given an opportunity to negotiate on the plan's procedures and its impact on employees.

Ordering the activity to cease and desist, the Authority overruled an administrative law judge's decision and held that management's action "impeded the ability of the union to perfom as an equal partner with management." FLRA did not order bargaining over the reorganization because the union had had actual knowledge of the reorganization and failed to seek negotiation *(4 FLRA No. 70).*

The U.S. Court of Appeals for the Sixth Circuit pointed out that the FLRA found the union to have received actual notice through the steward while at the same time ruling that the Command violated the statute because actual notice was not delivered to the steward in his role as union representative.

"We fail to see how [the steward], in his role as a human being, could not receive actual notice as an employee and formal notice as a union steward by his singular attendance at the reorganization meeting," the judges said.

They added that labor laws are designed to smooth labor-management relations by providing informal mechanisms to resolve disputes. But in attempting to fine tune the statute's notice requirement, the Authority had interjected "needless formality into that process." *(Air Force Logistics Command v FLRA, USCA Sixth Circuit No. 80-3798, June 23, 1982)*

The Ball Is in the Union's Court

Where the parties have negotiated a tentative agreement which includes a broad scope grievance procedure and the agreement has not been ratified or executed, management has no obligation to negotiate a grievance procedure as a separate interim agreement. So ruling, the Federal Labor Relations Authority dismissed an unfair labor practice complaint filed by the Metal Trades Council against the Norfolk Naval Shipyard, Virginia for refusal to bargain.

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PM1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Valid Humanitarian Reasons

Casefacts: The grievant, a toolmaker, had worked at the naval ordnance station for over 14 years. Two years previously his son, a high school student, had developed lukemia. Doctors advised that the disease was terminal and the boy would probably not live longer than 18 to 24 months. The boy became progressively worse and was unable to return to school after mid-December 1980. He died five weeks later.

Due to his son's illness, the grievant had exhausted his vacaton time by the fall of 1980. Financial difficulties necessitated the wife's working part time at night.

Each week the son had four separate medical appointments to which his father transported him. Because of the doctors' schedules and the son's desire to remain in school as long as possible, the appointments were scheduled in late afternoon or evening.

In November 1980 the toolmaker was on the day shift with hours from 7:00 a.m. to 3:30 p.m. He told management that his son's blood count was serious, and requested permission to come to work earlier and leave earlier in order to spend more time with him. Permission was denied.

That same month management learned that there were insufficient volunteers to man the December night shift. In an informal advance notice prior to the official posting, the grievant's supervisor notified him that from November 30 to December 27 he would be required to work the night shift from 3:30 p.m. to midnight.

The grievant immediately sought an exemption from the assignment. When his request was denied, he was forced to work the shift. He filed a grievance on December 2.

The International Association of Machinists, in processing the grievance, argued that the assignment created a personal hardship for the toolmaker since it prevented him from being with his son except for a brief time in the morning before school started. Moreover, he was unable to assist in transporting his son to medical facilities. The grievant told management that he felt that he was watching his son die.

Article 8 of the parties' contract provides that night shift assignment be made first from among volunteers. In the event of insufficient volunteers, there will be a forced four week assignment to a night shift.

The article also states that "Employees may be granted temporary shift changes ... when such change is based on valid humanitarian reasons where denial of the request would impose a serious hardship on the employee."

Management ultimately denied the grievance, on the same day the son died.

The employer argued that the grievant did not provide management with sufficient information to make it aware that the night shift assignment would impose a serious hardship. Further, the contract required that to be exempt from a night shift assignment, an employee must demonstrate personal hardship to himself, as distinguished from other members of his family. Past practice, the employer said, bore out this contention.

Substantial evidence at the arbitration hearing showed that although the base commander—the person ultimately responsible for denying the grievance—was not aware of many of the facts, his subordinates were. None, however knew that the son's death was imminent. The base commander testified that had he known all the facts, he would have granted the exemption.

Issue: Did management violate Article 8 by refusing to exempt the grievant from the night shift assignment?

Award: Arbitrator John W. Palmer sustained the grievance. As the grievant did not request or prove any measurable damages, the arbitrator awarded none.

"Based upon the testimony considered as a whole, it is more probable than not that management was fully aware of the family difficulties and personal hardship the grievant was experiencing in November 1980 through January 1981," Arbitrator Palmer noted.

"The decision to deny the grievant an exemption was admittedly a collective decision. Although arguably not every member of management was fully aware of all the facts, collectively they were. Information made available to responsible members of management under the circumstances of this case is attributable to all members of management. The grievant has met his burden of proof."

The arbitrator found that management's past practices argument was not supported by testimony. *(Naval Ordnance Station and International Association of Machinists, January 4, 1982). LAIRS #13872)*

The Labor-Management
FORUM

National Guardsmen Not Employees Within Meaning of Act, FLRA Says

Twenty-eight of 29 small shop chiefs at the National Guard activity in Albany, New York are supervisors, according to a Federal Labor Relations Authority decision. The 29th chief was not a supervisor, and hence was a member of the bargaining unit, because he supervises only guardsmen. And guardsmen, the Authority explained, are not "employees" within the meaning of 5 USC 7103(a)(2).

Thirteen other incumbents in the disputed positions of examiner and program and mobility technician were judged to be valuable experts and professionals rather than management officials. The Authority noted that these 13 employees did not exercise any duties or responsibilities requiring them to formulate, determine or influence the Guard's policies. *(9 FLRA No. 2—June 1, 1982)*

Confidential Secretaries Excluded from Bargaining Unit, FLRA Rules

Only one of the 24 positions listed on the union's petition for clarification of unit was actually in the bargaining unit, the Federal Labor Relations Authority determined. A staff engineer was found to be a unit member, but 23 positions were confidential, managerial or did not share a community of interest with unit employees. The case covered workers at the Bureau of Mines Twin Cities Research Center in Minnesota.

Nine secretaries were judged confidential because they work for supervisors, personnel officers or administrative officers involved in personnel matters, including adjustment of grievances. By typing for their bosses, the secretaries have advance notice of personnel actions and access to files of confidential labor relations materials. They act in a confidential capacity to individuals who effectuate management policy in the field of labor-management relations, the FLRA noted.

Found to be a management official was an assistant to a research director. He plans and monitors projects, and his recommendations are frequently implemented. He also has authority to act for the research director and the Bureau and to commit funds and facilities.

Although bearing the same title of staff engineer, an examination of the duties of two incumbents revealed that one was a management official and hence excluded from the unit, while the other was a unit member. The excluded engineer uses judgment and discretion to plan, schedule and implement programs, and his recommendations carry considerable weight and are generally implemented.

Other titles on the union petition were those of 12 faculty members hired as intermittent or When-Actually-Employed employees who work no more than 130 days per year. They have no fixed tour of duty and no reason to expect to get an assignment from one year to the next. Moreover, to be eligible for assignment to Bureau projects, they must retain their status as professors with their universities.

In deciding that the faculty members were not in the unit, the Authority cited its earlier ruling whereby intermittent employees may be included only if they share a community of interest with unit employees which includes a reasonable expectancy of continued employment. *(9 FLRA No. 14—June 16, 1982)*

Panel Orders Probationer Appeal

A bargaining stalemate concerning the ability of probationary employees to grieve a discharge was the subject of an order of the Federal Service Impasses Panel. Taking the middle ground, the Panel directed the parties to adopt language allowing probationers to grieve termination after the first six months of their one-year probationary period.

The Federal Home Loan Bank Board's District 11 had wanted to exclude terminations of probationary field examiners from the negotiated grievance procedure. Local 3424, AFGE argued for their inclusion on the grounds that their training was unique, and that there were no other supervisory personnel in their immediate surroundings who could judge whether the examiner-in-charge's ratings were accurate.

Although the Panel agreed that the employer should be able to separate probationary employees without observing all of the safeguards to which nonprobationers are entitled, "we do not agree that this should extend through the full length of the probationary period in view of the employee classifications involved and the fact that new employee training may result in disparate treatment." *(Case No. 82 FSIP 54—June 7, 1982)*

(continued from page 1)

Since 1977 the parties have been operating under an agreement with a narrow scope grievance procedure. They negotiated on a new contract from May 1979 until October 1980, at which time they reached tentative agreement on one with a broad scope procedure. The tentative agreement was never ratified by the union membership nor executed by the parties.

In January 1981 the MTC opted by letter for a full scope grievance procedure. The union based its request on the Authority's 1979 interpretation of 5 USC 7121 which authorized renegotiation of existing grievance procedures where either labor or management objected to the continuation of a narrow scope procedure.

The shipyard took the position that by reaching a tentative agreement, it had complied with FLRA guidance and had no further duty to bargain. The Authority agreed, adding that the union's failure to take the tentative agreement to its members "cannot serve to revive" that bargaining obligation. *(9 FLRA No. 6—June 4, 1982)*

FPM Provision Limits Bargaining

The Federal Labor Relations Authority has ruled that Federal Personnel Manual provisions which are binding on officials and agencies to which they apply—even if they do not meet the technical definition of rule or regulations—serve as a bar to negotiations.

The Authority's decision accordingly upheld the FPM requirement that position descriptions (PDs) be current and accurate to enable proper classification for pay purposes.

The FLRA holding clarified 5 USC 7116(a)(1) which imposes a duty to bargain "to the extent not inconsistent with any federal law or *any governmentwide rule or regulation.*"

The case stemmed from a National Federation of Federal Employees proposal to Lowry Air Force Base. NFFE asked that management be precluded from revising PDs regardless of the duties actually assigned unless the duties were consistent with a position's current professional level. The union was concerned that assignment of nonprofessional duties could deflate a professional employee's job grade if reflected in the PD.

The Authority found the proposal nonnegotiable because it would result in inaccurate PDs. An FPM chapter requires PDs to be certified by supervisors as accurate.

Citing the labor statute's Conference Committee Report, the Authority said that the FPM provision constitutes a rule or regulation within the meaning of the act. It therefore serves as a limitation on the scope of bargaining. *(9 FLRA No. 20—June 23, 1982)*

The Way We Were

Changes to starting times of existing shifts triggered an obligation to bargain on the decision itself, while the establishment of a new second shift required bargaining only on the impact and implementation of management's decision, the FLRA declared. The Authority noted that the different requirements were based on whether the shift decisions were so integrally related to staffing patterns as to determine the numbers and types of employees assigned. This was the case in establishing the new shift, but not in changing the time of existing shifts.

Because installation of a new shift was integrally related to staffing patterns, the U.S. Customs Service did not have to bargain on this decision unless it opted to do so. Customs was required, however, to bargain on the impact and implementation of its decision.

As a remedy, the FLRA directed the employer to bargain on procedures used in making the change, and on appropriate arrangements for employees adversely affected. The Authority found that a *status quo ante* remedy was not warranted because of the disruption in government operations such a remedy would cause.

Regarding management's decision to change the existing shift, the Authority judged that Customs had a duty to bargain fully on this second decision because it involved a change in conditions of employment.

Management's failure to do so was an unfair labor practice. The Authority ordered a *status quo ante* remedy by directing the activity to reinstate the previous starting and quitting times. It also directed the employer to offer the union an opportunity to bargain on the change. *(9 FLRA No. 15—June 16, 1982)*

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Court Sets Aside FLRA Policy on Pay for Travel and Per Diem

By a two to one majority, the U.S. Appeals Court for the Second Circuit overturned a Federal Labor Relations Authority ruling which ordered the employer to pay travel and per diem expenses for union officials engaged in negotiations. The New York National Guard had challenged the Authority's order. The second circuit decision creates a "conflict-in-the-circuit" because the ninth circuit court earlier this year sustained a similar FLRA order in a travel and per diem case. (See *Consultant* of May 7, 1982 for ninth circuit decision.)

Both cases hinged on the Authority's Interpretation and Guidance, *2 FLRA No. 31*, which interprets official time. The second circuit disagreed with the ninth circuit's finding that the FLRA policy was "reasoned and supportable."

Writing the majority opinion in the Guard case, Judge Joseph Edward Lumbard found "no authority to support the FLRA's command that the federal government, alone among federally regulated employers, must pay expenses incurred by its adversaries across the bargaining table."

Judge Lumbard noted that the second circuit's review was not inhibited by the deference normally due the Authority's construction of its enabling statute. The Authority decision rested on an interpretation of "official business" in 5 USC 5702(a), a section not part of the Civil Service Reform Act which created the FLRA, but instead part of a subchapter administered by the General Services Administration. "No great deference is due an agency interpretation of another agency's statute."

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Too Thin a Reed

Further, the Authority gave no legislative history supporting its contention that collective bargaining done on "official time" is also "official business" entitling employees to per diem. The Authority relied instead on the Congressional finding that collective bargaining is in the public interest. Such a general declaration of policy is "too thin a reed" to support a substantive ruling costing the federal government substantial sums of money for per diem and travel expenses, the second circuit found.

Moreover, Judge Lumbard said, Congress did not find that collective bargaining furthers the public interest. Instead Congress found that *statutory protection* of collective bargaining furthers the public interest. Congress did not give bargaining the blanket endorsement that FLRA claims to have found in the statute.

Comparing federal sector bargaining to comparable private sector practice, the decision observes that the routine expense the FLRA would impose upon the federal government is viewed as an extraordinary remedy by the National Labor Relations Board.

"Under all the circumstances we cannot believe that Congress meant the government to assume such an unusual burden, so different from any accepted practice in dealings between employers and employees, absent a clear and specific provision to that effect." So concluding, the second circuit denied enforcement of the FLRA order.

Judge James L. Oakes issued a dissenting opinion, based primarily on the ninth circuit decision in the Bureau of Alcohol, Tobacco and Firearms case. "On the merits," he wrote, "while the position of the majority here has some strength, the FLRA's decision is 'reasonably defensible' and should be upheld." *(Div. of Military and Naval Affairs, State of New York v. FLRA, USCA Second Circuit No. 82-4036, June 28, 1982)*

Three other challenges to FLRA's travel and per diem policy are pending in the courts.

Party Pooper

Management's unilateral prohibition of the past practices of allowing employees to conduct special activities during break time and lunch periods for employee retirements, baby showers, etc. was an unfair labor practice, the Federal Labor Relations Authority ruled. The Social Security Administra-

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PM1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

By the Sweat of Their Brow

Casefacts: It was a hot Monday in Kansas City, and the air conditioning system had failed in the main file room of the Internal Revenue Service. In addition, the lights in the files area were working only partially, although fully operative in the office area.

Employees complained they were unable to file because of inadequate lighting and high temperatures. The supervisor assigned them to other work at their desks.

When that work began to run out, management furloughed When-Actually-Employed employees for the remainder of the day, with the caveat that those willing to work in the lighted parts of the files could stay on the job.

On Tuesday the air conditioning was still out but the lighting was fully restored. Numerous employees came out of the files area claiming they were unable to work due to the heat.

The supervisor told them they could either return to their normal work area or take the rest of the day off, using sick leave, annual leave or leave without pay. Of the 64 employees, 46 left work.

The parties' contract binds them to observe Federal Personnel Manual policies. An FPM provision in effect at the time of the incident provided that dismissal/emergency leave on account of heat would be made only when a temperature of "95 degrees and 55 per cent humidity or higher, or equivalent, has been reached."

In the contract's administrative leave article, IRS agrees to grant such leave if inclement weather necessitates the closing of one office.

Section 1.A. of the health and safety article mandates the employer "to the extent of its authority, to provide and maintain safe working conditions for all employees." Under Section 1.B., "Whenever it becomes necessary to move an employee from a work area because of conditions ... which pose a threat to that employee's health or physical safety, the employer will make every effort practicable to find work for that employee elsewhere in the Center."

The National Treasury Employees Union grieved that employees should have been given administrative leave. The fact that IRS was willing to grant sick leave, the union contended, was a tacit admission that the heat and humidity were so severe they made workers ill.

NTEU asserted that working conditions in the files on Monday and Tuesday constituted a threat to health and safety. Grievants told of nausea, headaches, dizziness and heightened allergic reactions

Other NTEU charges were that the agency made insufficient efforts to maintain safe conditions, and that it failed to attempt to find other work for employees.

IRS maintained that while temperatures in the files ranged from 85 to 90 degrees, this was not a serious threat to health or safety. It had reported the situation to the building's owner and the utility company, and had continued to press for repairs. It had brought in fans.

And lastly, IRS said, it was under no statutory, regulatory or contractual mandate to close the office or grant administrative leave.

Issue: Did management's challenged actions violate the agreement?

Award: Arbitrator Anthony V. Sinicropi denied the grievance.

He found that to the extent of its authority the agency had met its Section 1.A. obligation to provide safe working conditions. Factors causing the lighting and air conditioning to fail could not be considered management's fault. IRS reported the problem to the proper authorities, and through furnishing fans made a reasonable effort to provide ventilation. The union had not demonstrated any other steps IRS could have taken to ameliorate the work environment.

The arbitrator noted that there were no scientifically verified standards upon which he could base a determination that the heat and humidity levels were so severe as to threaten the grievants' health and safety. Moreover, the activity was bound by FPM criteria.

While conditions were extremely uncomfortable, the arbitrator said, given FPM policy and contract language, this did not justify a mass dismissal. IRS willingness to grant sick leave comported with FPM policy.

In light of his above determination, Arbitrator Sinicropi ruled that IRS was not obligated to make every effort to find other work. Because the contract establishes no standards for declaring an emergency situation, he was unable to conclude that management was unreasonable or arbitrary by refusing to close the files area. *(NTEU and IRS Kansas City Service Center—November 11, 1981. LAIRS #13735.)*

The Labor-Management
FORUM

Tainted Election Set Aside

Unfair labor practices by the Immigration and Naturalization Service interfered with employees' free choice, thus tainting a representation election, the Federal Labor Relations Authority ruled. The FLRA set aside the election results and ordered a new election held no earlier than 60 days from the posting of management's *mea culpa* notices. Regarding management's unilateral changes of conditions of employment, the Authority directed INS to return to the *status quo* existing prior to the changes.

The National Border Patrol Council, AFGE, which represents a 2,300 member unit, was being raided by the International Brotherhood of Police Officers (IBPO). Although IBPO won the election, it was not certified due to ULP complaints filed by AFGE both before and after the election, and its objections to the election.

AFGE contended that the agency failed to adhere to the local agreement and to maintain conditions of employment when the representation question was pending. All these changes made AFGE appear powerless and turned workers to IBPO.

Among other things, the union alleged that INS unilaterally changed traffic check points and uniforms, halted coffee breaks, and ended the practice whereby employees used their own vehicles to travel to work stations. Further, an instructor at the Border Patrol Academy had endorsed AFGE's rival.

AFGE also claimed that the agency allowed the raiding union to use the management half of a negotiated INS-AFGE bulletin board, thus giving workers the impression that INS endorsed the raider.

One of AFGE's objections to the election was that FLRA's regional director failed to invoke the "blocking rule" which permits ULP charges to delay an election until the charges are resolved.

The Authority sustained many of AFGE's ULP charges and objections. For example, allowing IBPO to post material in management's space on the bulletin board unfairly favored IBPO since employees could reasonably view it as employer assistance and support of IBPO.

The Authority dismissed the union allegation regarding the instructor. Because he was neither a supervisory nor managerial official, and was not acting as an INS agent, his statements were personal views protected by law.

The FLRA advised that whether ULP charges block an election is a discretionary matter within the purview of the regional director. Here, the director's decision to adjudicate ULP complaints and objections to the election concurrently was not an abuse of discretion.

The Authority explained the reasoning behind its decision. An agency's acts and conduct during an election campaign, even where they do not violate the statute's ULP section, "may nevertheless constitute objectionable conduct requiring the election to be set aside if such conduct interfered with the employees' freedom of choice."

While recognizing the difficulty of assessing how pervasive the impact of agency actions might be on voters, "the standard for determining whether conduct is of an objectionable nature is its potential for interfering with the free choice of the voters."

In this case FLRA determined that such INS actions as unilaterally changing contract terms and terminating past practices during the election period interfered with free choice.

"The election must be set aside," the Authority said, "and the employees given a second opportunity to exercise their protected rights." *(9 FLRA No. 36—June 29, 1982)*

Cash on the Barrel Head

The Federal Mediation and Conciliation Service proposes to charge a $25 fee for furnishing a panel of arbitrators from which the parties select an arbitrator for labor-management relations disputes. For the direct appointment of an arbitrator without the furnishing of a panel, the fee will be $30. For appointment of permanent umpires or panels, the cost will vary depending upon the particular request. Payment must be made at the time the request is made.

The Service explains that since the benefits of its service are primarily to the users, it is appropriate that they incur the cost. Free provision of these FMCS services, as in the past, unnecessarily affects private agencies which must charge for similar services.

The proposed FMCS rule appeared in the *Federal Register* of July 7, 1982. Interested parties have until September 7 to comment.

(continued from page 1)

tion in Kansas City, Missouri also unfairly ended the practice of catered luncheons, of sending out for food, and for collecting donations for employees about to retire or who had had deaths in their family.

Local 1336, AFGE lost on two of its complaints against the center. Management could ban the excusal of a few employees from duty so they could prepare for and clean up after special activities. Moreover, SSA was on safe ground when it halted the wearing of special costumes by workers in celebration of holidays such as Christmas. The preponderance of evidence did not establish the existence of a past practice for these situations, the FLRA said.

SSA was ordered to stop unilaterally altering or changing established past practices, and to bargain with the union over any proposed changes. *(9 FLRA No. 33–June 24, 1982)*

Circuit Court Upholds FLRA

When the D.C. Circuit court denied its petition, the National Federation of Federal Employees lost its bid for reversal of a Federal Labor Relations Authority decision declaring nonnegotiable the union's contracting-out proposals. The union attacked the Authority's holding on both procedural and substantive grounds.

The case began in August 1979 when NFFE protested to the Authority the refusal of Homestead Air Force Base to bargain on its proposals. The AFB responded with a statement of nonnegotiability. NFFE's rejoinder was untimely filed. Consequently, in reaching its decision, the Authority accepted the agency's factual representation and refused to consider NFFE's tardy response.

Proposals Violated Management Rights

The Authority ruled in September 1981 that the proposals were not bargainable because they called for union access to management's internal recommendations and for union presence at pre-bid and bid-opening conferences. Such NFFE action would directly interfere with management's statutory right to deliberate and make decisions with respect to contracting out, FLRA determined.

NFFE's procedural argument was that the Authority's refusal to accept the union's four-day late rejoinder limited the inquiry. The Court, however, judged that the appeals procedure is intended to resolve negotiability disputes speedily, thus minimizing interruptions to collective bargaining. The law sets rigid time limits for filing appeals, statements and responses, and directs the FLRA to issue its decision at the earliest practicable date.

If Congress' purpose is to be achieved, the appeals court stated, statutory time limits must be strictly observed. The Authority acted properly when it refused to consider NFFE's untimely response.

Part of NFFE's procedural objection was that FLRA should have independently analyzed the union proposals to determine possible effects on management rights. The court noted that the parties themselves bear the burden of creating a factual record for FLRA use. Accordingly, the Authority had no obligation to conduct a factual investigation to secure proof of either party's claims.

Finding the FLRA's decision consistent with the Civil Service Reform Act and relevant precedent, the court shot down the union's substantive argument that FLRA's decision was improper. *(NFFE v. FLRA, USCA DC No. 81–2198, June 29, 1982)*

Court Chides FLRA

"We recognize that the result in this case is somewhat anomalous," Judge Harry T. Edwards concluded. Because NFFE filed its statement four days late, the FLRA refused to consider it. The FLRA then issued its decision 21 months after the union's tardy filing. "Little is gained by insisting that the parties comply with strict time limits in order to expeditiously resolve negotiability disputes, only to have the FLRA take nearly two years to resolve a relatively simple case."

"Unfortunately," the judge said, "we can do nothing in the present cause to rectify the obvious disparity between congressional intent and Authority practice. ... In this instance the adverse consequence of the FLRA delay is clear: Local 1167 has been effectively foreclosed from negotiating a new collective bargaining agreement to replace the agreement with Homestead AFB that expired in January 1979 ... We can only admonish the Authority in the strongest possible terms to improve upon its sad performance."

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New Alternative Work Schedules Act

Congress has passed a measure providing a framework for continuation of programs permitting compressed and flexible work hours for federal employees. The new Alternative Work Schedules Act (AWS), which has a three-year limit, replaces a similar pilot law enacted in 1978.

President Reagan signed the Federal Employees Flexible and Compressed Work Schedules Act of 1982, PL 97–221, on July 23, 1982, which is also its effective date.

Among its provisions the act:

- Extends alternative work schedules in existence when the new AWS took effect, but allows agencies 90 days to terminate unilaterally those which have had adverse agency impact.
- Establishes "adverse agency impact" as the criterion for terminating existing schedules or deciding not to establish new schedules.
- Defines adverse agency impact as a reduction in productivity, a drop in services to the public, or an increase in costs to the agency, other than normal administrative costs.
- Gives unions the right to initiate bargaining on an alternative AWS program within 90 days of an agency's unilateral termination of an existing plan.
- Sends bargaining impasses on AWS to the Federal Service Impasses Panel for resolution within 60 days. The Panel has responsibility for reviewing management determination of adverse impact.
- Places the burden on agencies to show evidence of adverse agency impact.

The law requires plans to contain procedures for keeping track of employee attendance. Time recording devices may be used where employees are on flexible schedules as defined by the act.

In the near future, the Office of Personnel Management will issue regulations for the administration of the provisions of the act.

No Penalty for Early Withdrawal

Acting on a labor complaint, the Federal Labor Relations Authority found that the Internal Revenue Service is obligated to bargain on the union's work load proposals even though the union failed to appeal the agency's declaraction of nonnegotiability concerning an earlier similar proposal.

The IRS had contended that by failing to file a negotiability appeal with the Authority, the National Treasury Employees Union waived its bargaining rights on the subject.

In the Authority's view, while the union could have submitted a negotiability appeal to the Authority on its earlier proposal, it was not bound to do so. Instead, NTEU clearly had a right to submit altered proposals to the employer.

Accordingly, the Authority said, the IRS refusal to bargain on the altered proposal solely on the grounds that NTEU had in effect waived its bargaining rights was an unfair labor practice. *(9 FLRA No. 27—June 23, 1982)*

New FMCS Director Takes Office, Two FSIP Members to Be Named

Kay McMurray was sworn in as director of the Federal Mediation and Conciliation Service July 22. A well-known arbitrator, McMurray served on the National Mediation Board for five years. (For more details, see *Consultant* of July 2, 1982.)

FISP Appointees

President Reagan has announced his intention to appoint two new members to the Federal Service Impasses panel for terms expiring January 10, 1987. Senate confirmation is not required for Panel members.

N. Victor Goodman would succeed James E. Jones, Jr. He is currently a partner in the law firm of Topper, Alloway, Goodman, DeLeone & Duffey in

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PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Mary Jane at Mint

Casefacts: A security officer at the San Francisco Assay Office of the Bureau of the Mint received a report from an activity policeman that an employee had been seen placing a marijuana plant in a car in the parking lot. The car belonged to a woman employee—the grievant.

That same day, June 13, 1980, the security officer questioned the grievant. She answered that she knew the plant was in her car, but not what kind of a plant it was. When asked how it got there, she made no reply. The grievant said she was supposed to take the plant to someone in the city, but refused to say to whom.

The grievant's account of the interview differed. In her version, she had said she did not know either who put the plant in her car or the name of the person to whom she was to deliver it.

Management informed the grievant that because she failed to answer the officer's questions, she was subject to discipline, including discharge. The Activity subsequently handed her a letter which promised that any information she provided would not be used against her in a criminal proceeding, and that if she continued to refuse to answer questions, discipline could follow.

The grievant still did not respond, and on July 23 she received a letter of proposed dismissal.

By memo of August 8 the grievant wrote that she did not know who put the plant in her car or to whom it was to be delivered. On August 20 she gave management the name and address of the intended recipient. In October she was informed that the proposed removal had been changed to a 14 day suspension.

Under the Mint-American Federation of Government Employees contract, the parties are bound by agency rules and policies. The agency's standards of conduct require workers to testify or respond to questions concerning matters of official interest when directed to do so by management.

Management testified that it was especially concerned about drug-related activities because of a possible relationship between drug dealing and thefts at the agency. It was important to obtain information about other employes involved in such activities.

At the arbitration hearing, the grievant testified that when she arrived in the parking lot, she met a fellow employee who said he had a plant for her to take into San Francisco. She handed her car keys to her male passenger to transfer the plant to her car, and entered the building. Accordingly, when asked who put the plant in her car, she honestly could not be certain which of the two men was responsible.

The grievant also testified that on July 3 the fellow employee gave her a sworn statement declaring that a friend of his had put the plant in the car, and that the fellow worker told her the name of the plant's recipient.

AFGE argued the suspension should be set aside because the agency had not conducted a *bona fide* investigation. It was setting her up, and already knew the answers to its questions before asking her. If this were a valid investigation, why had not security contacted the police? Further, the union maintained, there were procedural defects in the Mint's handling of the case.

Issue: Was the 14 day suspension for just cause?

Award: Arbitrator Adolph M. Koven reduced the suspension to three days. While management had a right to answers to its questions, it was unreasonable to subject the grievant alone to a heavy penalty.

The arbitrator concluded that the "I don't know" response, while technically true, was misleading. The grievant had at least some information on how the plant got into her car.

He found it inexplicable that the grievant told the agency nothing about the fellow employee's July 3, 1980 statement until the arbitration hearing of February 3, 1981. Also inexplicable was that she did not give management the name of the plant's recipient until August 20.

While not accepting AFGE's argument that the agency set up the grievant, Arbitrator Koven believed the investigation was less vigorous than expected, given the employer's urgent concern about the drug problem. He was not convinced by the security officer's explanation that the police were not called because the incident was not serious enough. The agency had concentrated solely on the grievant and disregarded other possible suspects identified by the parking lot observer.

The procedural failings, the arbitrator ruled, were not so serious as to warrant completely setting aside the discipline. *(Bureau of the Mint, U.S. Assay Office, San Francisco, California and Local 51, American Federation of Government Employees—May 28, 1981. LAIRS #13448)*

The Labor-Management
FORUM

Time Is of the Essence

Unpersuaded by labor arguments, the Federal Labor Relations Authority recently denied two union requests for reconsideration of untimely-filed exceptions to arbitration awards.

Under FLRA rules, documents required to be filed with the Authority must be received in the Authority's national office before close of business on the last day of the prescribed time limits. The time limit for filing exceptions to arbitral awards is 30 days beginning on the date of the award.

In *Puget Sound Naval Shipyard, 7 FLRA No. 133*, exceptions to the arbitral award were due at the Authority on October 20, 1981. But because the union's exception did not arrive until October 22, it was dismissed by FLRA. Requesting a reconsideration, the union argued that its document had been deposited with the U.S. Postal Service prior to October 20.

The Authority, however, held that the date a document is mailed "is without controlling significance in timeliness determinations under FLRA rules and regulations," and it refused to reconsider.

In *Scott Air Force Base, 5 FLRA No. 68*, the arbitrator's award was dated February 23, 1981, and accordingly exceptions were due at the Authority's office on March 24. The union did not file with the Authority until March 26. The union argued that because the arbitrator's award was served by mail, five days should be added to the prescribed 30 day time limit.

The FLRA pointed out that the time limit is not triggered by the party's receipt of the award. Rather, as expressly provided in FLRA rules, the time clock begins to run on the date of the award.

Intermittent Employees Found Part of Appropriate Unit

On-call and scheduled intermittent employees should be included in a bargaining unit of nonappropriated fund activity employees at Fort Buchanan, Puerto Rico, the Federal Labor Relations Authority ruled.

The on-call intermittents work when needed, and the scheduled intermittents are scheduled to work on a pay-period by pay-period basis. Neither group receives regular fringe benefits, and their personnel policies and practices are somewhat different from those of regular full-time and part-time employees, Nevertheless, they perform similar work, receive the same training and supervision, and work in the same location as regular employees.

Although the employer argued that these intermittent employees have no reasonable expectancy of continued employment, the facts indicated otherwise. More than half the 77 intermittent employees had worked the entire six month period prior to the hearing, and most of the remainder had worked consistently for the preceding several months.

The Authority accordingly concluded that these employees had reasonable expectancy of continued employment and shared a community of interest with regular employees. For these reasons the FLRA approved the election petition filed by the Congreso de Uniones Industriales de Puerto Rico. *(9 FLRA No. 17—June 23, 1982)*

FLRA Upholds Arbitration Award

The Federal Labor Relations Authority refused to overturn Arbitrator Henry B. Welch's finding that the reorganization at Redstone Arsenal, Alabama did not violate agency regulations or its contract with Local 1858, AFGE. So ruling, the FLRA dismissed as deficient AFGE's exception to the arbitration award.

The reorganization had resulted in the addition of 38 military instructor positions, the loss of 45 civilian instructor positions, and the use of temporary employees.

The union was unable to prove its claim that the arsenal wrongly converted civilian positions to military positions, erred in its use of excess military personnel, and was restricted in the number of times employees could be temporarily appointed. *(9 FLRA No. 47—July 13, 1982)*

ALJ's Remedy Amended by Authority

Partially adopting the remedy of its administrative law judge, the Federal Labor Relations Authority ordered the agency to cease refusing to furnish the union with data needed to represent a suspended employee. However, the Authority saw no need for another oral hearing at which the union could try to persuade management to reconsider the adverse action, since the Merit Systems Protection Board had already resolved the issue.

While his union was pressing unfair labor practice charges against the Internal Revenue Service, the employee appealed his suspension to the Board—and lost. Under the circumstances, the Authority said, the ALJ's proposed rerun of the meeting would serve no purpose. *(9 FLRA No. 57—July 16, 1982)*

(continued from page 1)

Columbus, Ohio. He is a member of the Labor Law Section of the Ohio State Bar Association and the American Bar Association Committee on Development of Law Under the National Labor Relations Act. A graduate of Yale University, he received a J.D. from Harvard Law School in 1961.

Daniel H. Kruger would replace Arthur Stark. Kruger has been associated with the Michigan State University since 1956 when he helped establish the School of Labor and Industrial Relations and is currently professor of Industrial Relations. He is also active as a factfinder and arbitrator of labor disputes. He was graduated from the University of Richmond (B.A., 1949) and the University of Wisconsin (M.A., 1951; Ph.D., 1956).

When appointed, the nominees will join five other Panel members: Chairman Robert G. Howlett, Jean T. McKelvey, Beverly K. Schaffer, Charles J. Morris and Donald F. Rodgers. Thus, the Panel will have its normal membership for the first time in almost two years.

More on Official Time

The Federal Labor Relations Authority has found a Navy activity guilty of an unfair labor practice for refusing to bargain over whether a union negotiator will receive official time for negotiating a labor agreement outside his own bargaining unit.

The Authority earlier had ruled that an employee is entitled under law to official time only when bargaining an agreement for the unit in which he is employed. (See *Consultant*, February 12, 1982.)

Local 2096, AFGE is the exclusive representative of four Naval bargaining units in Dahlgren, Virginia. The local's vice president, who works in one unit, the Surface Weapons Center, wanted to act as negotiator for employees in another unit, the Space Surveillance Systems.

To ensure that its official got paid, AFGE's ground rules proposals for the Systems unit included the following: "All union negotiators who are employed in the agency shall be authorized official time for negotiations and mediation and impasse procedures."

Terming the proposal nonnegotiable, management refused to bargain and also refused to grant the union vice president official time for negotiating the ground rules.

The Authority, citing *Wright Patterson Air Force Base, 7 FLRA No. 118*, found that no ULP was committed in refusing to give official time to the union official. However, it did find that the activity's refusal to bargain on the proposal was a ULP.

In brief, while management in this situation has *no obligation* to pay official time to an employee negotiating with another employer for employees in another unit, management does have a *duty to bargain*, according to the Authority, on a proposal granting that negotiator official time. *(9 FLRA No. 30—June 23, 1982)*

The Navy Department has asked the FLRA to reconsider the decision.

Distributing Union Literature

No and yes, the Federal Labor Relations Authority said when the union complained that General Services Administration had interfered with its right to distribute literature.

No, the president of Local 1705, NFFE was not entitled, while on duty, to place union fliers on desks of employees who were working. Yes, GSA was unfair in its refusal to allow her, while in nonduty status, to leaflet cars in the employee parking lot, a nonwork area.

The Authority dismissed the employer's argument that it was privileged to refuse the union's request to distribute fliers which dealt with a pay reform bill pending before Congress. This subject matter was outside agency control, GSA said, and outside the employer-employee relationship.

A union's conduct in attempting to influence Congress, especially on matters directly affecting working conditions, the FLRA observed, is recognized as legitimate union conduct which is entitled to full protection. This right is essential in the Federal sector because so many fundamental working conditions are directly determined by Congress.

The FLRA accordingly found that GSA committed an unfair labor practice by prohibiting the distribution of the fliers in the parking lot. *(9 FLRA No. 32—June 24, 1982)*

Consultant

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The Federal Labor-Management

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New Developments Checklist ...

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Local labor relations specialist's signature binds employer ... p.4

Management should have offered union opportunity to bargain on impact of change in overtime ... p. 4

Blowin' in the Wind

Disagreeing with the findings of its administrative law judge, the Federal Labor Relations Authority ruled that the Internal Revenue Service had a duty to bargain on union proposals concerning private offices and ventilation problems.

As a result of a reorganization and the transfer of employees to the Chicago office, the National Treasury Employees Union proposed that the activity construct private offices for appeals officers and correct heating and air-conditioning problems. IRS not only refused to bargain; it went ahead and implemented an open space arrangement.

The employer argued that the private offices proposal conflicted with its decision to utilize the open space approach to office design, thus interfering with management's choice of the technology to perform its work—a subject bargainable only at management's option. As to the air conditioning and heating, the matter was outside IRS control because the General Services Administration has responsibility to correct it.

Although the ALJ had recommended dismissal of the union's unfair labor practice charges, the Authority cited *7 FLRA No. 89* in judging the employer guilty.

For an agency to rely on the technology exemption, it must demonstrate both that its choice of office design has a technological relationship to accomplishing or furthering the performance of its work *and* that the proposal will interfere with the purpose for which that design was adopted. In the Authority's opinion, IRS failed to show this relationship.

Ventilation Is Working Condition

The ventilation problem clearly involved a condition of employment, and to the extent that IRS had any discretion regarding the matter it had an obligation to bargain. This was true even if its discretion were limited to requesting that GSA correct the problem.

Balancing the violation against the degree of disruption in government operations, the Authority turned down the union's request that IRS dismantle the new office and return to pre-existing conditions. To impose a *status quo ante* remedy before the parties had a chance to return to the bargaining table, the FLRA said, would serve no apparent purpose. *(9 FLRA No. 73—July 21, 1982)*

Son of Weingarten

The federal labor relations statute requires only that employees be informed *annually* of their right to union representation at investigative meetings which they reasonably believe may result in disciplinary action. This decision by the Merit Systems Protection Board dismissed charges by an employee that the Defense Logistics Agency failed to notify her of her Weingarten right during investigatory interviews leading to her discharge.

The agency was able to prove that it had informed its employees of this right within the past year.

The MSPB found that 5 USC 7114(a)(2) and (3) require notification on a yearly basis, not at each individual interview. *(MSPB No. CH07528110162), July 26, 1982)*

Official Time Proposal Held Negotiable

The Federal Labor Relations Authority has found negotiable a union proposal requiring the employer to pay travel expenses incurred by any employees using official time under contract terms. "... it would merely incorporate into the parties' agreement the legal entitlement to such expenses," the FLRA said.

The U.S. Customs Service has asked the Authority to reconsider its decision. An appeal to the courts is a distinct possibility if FLRA holds to its initial determination.

According to the Authority, "Where, under provisions of section 7131(d) of the statute, it is agreed that an employee is to be granted official time consistent with the Authority's previously

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

I Don't Do Windows

Casefacts: When management at the Charleston Naval Shipyard told the sheet metal mechanic, first class, to clean out the boilers, he and eight other sheet metal mechanics filed a grievance.

Cleaning the boilers was an annual job which took about 70 man hours. It involved using a motorized brush with a cutting head to clean soot and rust from the circulating tubes, and vacuuming the outside of the pipes. For 17 years the chore had been assigned to sheet metal mechanics.

Under the contract between the shipyard and the Metal Trades Council, the employer agreed in Article 18 to refrain from assigning incidental duties to unit employees which are inappropriate to their positions and abilities. Neither the listing of specific duties in a job description nor the inclusion or omission of a statement regarding the performance of other duties would affect management's authority to assign work.

The article added that while good personnel management dictates that assignments be reasonably related to a worker's position and qualifications, "There are some situations where what might be considered unrelated duties are normally assigned . . ."

Article 18 also stated that "Except as required by special circumstances, emergencies or when understood as customary, supervisors should avoid assigning to employees additional or incidental duties which are inappropriate to their positions and qualifications . . ."

The employer contended that cleaning boilers was a proper incidental assignment for the sheet metal craft. They were skilled in working with thin metals, and the thin boiler pipes were subject to damage if the cleaning tool was used by an unskilled person.

The union emphasized that nothing in the grievant's job description referred even remotely to boilers or other cleaning work. This was not skilled work, and anyone could do it after a few minutes instruction. For the mechanic to perform the cleaning denigrated their craft. The appropriate craft was the air conditioning mechanics who were charged with maintenance of boiler operations.

Issue: Was the assignment of cleaning boilers to sheet metal mechanics a violation of Article 18?

Award: Arbitrator Joseph D. Pedigo denied the grievance.

He agreed that the position description of the sheet metal mechanics did not refer to this cleaning job. Yet no one denied that this was a recurring job that must be performed. The only question was, by who?

He said that the contract bans management from assigning inappropriate duties, but also gives it the otherwise unrestricted right to asssign duties regardless of whether they are listed in the job descriptions.

Arbitrator Pedigo was unconvinced by the shipyard's argument that skills of a first class sheet metal mechanic were essential for the job. The evidence indicated that almost anyone with rudimentary knowledge of power tools could do it after brief training.

If this were a first time assignment or even a limited precedent, the fact that this was a semiskilled job with no direct link with the craft would weigh heavily in the grievants' favor.

But that was not the situation. There was a firmly established precedent going back to 1965 during which time sheet metal mechanics performed the yearly task with no recorded protest or complaint.

An established past practice which in application runs counter to an explicit provision of an agreement can be discontinued after one party gives timely notice to the other party that in the future they will no longer be bound by the past practice but henceforth will follow the explicit applicable provision of the agreement.

"However, a past practice in the application of a provision of the agreement which does not run counter to, and is not violative of, the provision of the agreement becomes a valid and enforceable part of such agreement," he explained. In this case, Article 18 not only failed to explicitly prohibit the assignment, it implicitly provided for it.

The arbitrator did not consider the question of whether the job was inappropriate to the mechanics' positions and abilities since the contract said that except when understood as customary, supervisors should avoid inappropriate assignments. Seventeen years of uninterrupted past practice established this task as one of the understood and customary exceptions. *(Charleston Naval Shipyard* and *Federal Employees Metal Trades Council—April 16, 1982. LAIRS #14057)*

The Labor-Management
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Arbitration Award Upheld by FLRA

The law does not prohibit raising the unresolved question of a grievant's bargaining unit status as a collateral issue to an otherwise proper grievance, the Federal Labor Relations Authority ruled. The FLRA accordingly sustained an arbitration award holding that the grievant was a unit member.

The case involved an employee at the National Archives who protested her performance evaluation through the negotiated grievance procedure. The employer refused to process the grievance on the grounds that she was a management official.

The grievance then went to Arbitrator William M. Edgett who found that he could determine the matter, notwithstanding the union's pending unit clarification petition.

The Authority emphasized that although an arbitrator could make a status determination in these circumstances, "the negotiated grievance procedure and arbitration may not be used in place of a clarification of unit petition, and may not be used to challenge or dispute a decision of the Authority clarifying a bargaining unit." *(9 FLRA No. 45—July 2, 1982)*

Don't Take Any Wooden Nickels

A bargaining stalemate on overtime and lunch hours has been resolved by an order of the Federal Service Impasses Panel. After calling for written submissions, the Panel directed the U.S. Customs Service and the National Treasury Employees Union to adopt the union's proposals.

Overtime Mechanisms

On the overtime issue, NTEU wanted to maintain the status quo by continuing the "wooden money" bookkeeping mechanism. This procedure insures employees an equal opportunity to earn overtime pay.

Actual earnings are recorded for workers carrying out overtime assignments, and wooden money is entered for workers turning down such assignments. Consequently, employees with the lowest credited overtime hours (real and wooden) get the first opportunity to work overtime. The system routinely excuses employees from working overtime, but in an emergency no excusals are granted.

Customs wanted a $1,500 cap on wooden money as a way of controlling excusals from overtime assignments and of conforming to a statutory limitation on overtime. The Panel, however, noted that the employer presented no supporting evidence to substantiate its statements on the need for relief from the current practice. FSIP accordingly sustained the NTEU proposal.

Length of Lunch Periods

The second issue centered on the length of lunch periods. Should employees working a flexible duty tour have a one-hour lunch period and sign in and out for lunch, as Customs wanted? Or should they have 30 minutes for lunch with only those who took overlong lunches and failed to benefit from counseling being required to use a sign-in/sign-out sheet, as NTEU suggested?

The Panel ordered adoption of the union proposal which continued an already-existing practice. *(No. 82 FSIP 9—July 15, 1982)*

But Who's Counting?

The Federal Labor Relations Authority remanded a disputed arbitration award to the parties so they can seek clarification from Arbitrator J. Harvey Daly. Daly had upheld the one-day suspension of an employee at Norfolk Naval Shipyard for reading a newspaper on the job. Since this was a "second offense," the arbitrator noted, "and since the one-day suspension was the minimum possible, it was not excessive."

The Metal Trades Council contended that the first time the worker had been caught reading his paper, he received only an oral admonishment. Consequently, the award was deficient in characterizing the second such incident as a second offense. (Under Navy's guideline schedule of disciplinary offenses, oral admonitions are not counted as "offenses.")

The Authority commented that the arbitrator was apparently unaware that "offense" has a specialized meaning in Navy discipline. Thus, contrary to his conclusion, this was a first offense.

However, the schedule lists penalties ranging from reprimand to two-day suspension for a first offense, and from one to five-day suspension for a second offense. The grievant's suspension was accordingly within the appropriate range for a first offense.

The Authority was unable to ascertain whether the arbitrator would have reached a different result if he had not erroneously believed the incident to be a second offense. It ordered the parties to resubmit this award to the arbitrator for the limited purpose of clarifying whether, under the circumstances of a first offense, the grievant's one-day suspension was for just cause. *(9 FLRA No. 63—July 21, 1982)*

BOOKSHELF

Spot Reviews of Publications and Films

• OPM's Office of Labor-Management Relations has issued *Union Recognition in the Federal Government—November 1982,* OLMR 82-4. The report contains a listing of all recognitions in the Executive Branch, including the Postal Service. For details, see the *Consultant,* May 7, 1982.

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• OPM regrets to announce that because of budgetary constraints, it has terminated publication of the *Digest of Labor Arbitration Awards in the Federal Service.* The *Digest* was first issued in March 1978 and has had 10 supplements. The last one was *Supplement No. 10,* July 1981.

(continued from page 1)

cited policies, travel during such official time would perforce entitle an employee to payments from the agency for travel and per diem expenses."

The Authority's rationale for this legal entitlement parallels its reasoning in earlier decisions requiring payment of travel and per diem for employees engaged in union negotiations under section 7131(a): Since Congress found in 5 USC 71 that collective bargaining is in the public interest, employees receiving official time for labor relations purposes are on "official business" and hence entitled to travel and per diem payment. *(9 FLRA No. 70—July 21, 1982)*

"Hornbook Law" Applies in ULP Case

A labor agreement signed by a local labor relations specialist on behalf of his agency binds the employer, the Federal Labor Relations Authority said, and the agency's subsequent repudiation of the document is an unfair labor practice.

The specialist had express authority to conduct day-to-day labor relations for the Social Security Administration's Program Service Center in Illinois. He made independent decisions on grievances, ULPs, etc.

The trouble started when he signed a settlement agreement with Local 1395, AFGE which remedied a ULP. In the agreement the activity promised that in the future, before restricting to appointment by reassignment any position for which bargaining unit employees would otherwise be eligible to compete, it would notify the union and bargain on impact and implementation.

The specialist's boss, director of the center, told him that he had, without proper authority, given away a management right and that SSA would not honor the agreement.

In the Authority's judgment, however, the specialist *did* have authority to act on matters such as ULP charges. Moreover, the agreement did not violate management's rights. "It is hornbook law that under appropriate circumstances, an agent may, through the exercise of apparent authority, assume the responsibility and liability of the principal," the Authority's administrative law judge observed.

The FLRA directed SSA to honor the settlement agreement. *(FLRA No. 58—July 16, 1982)*

Left High and Dry

The Federal Labor Relations Authority found that management's failure to bargain on the impact and implementation of a change in overtime policy was an unfair labor practice.

For some years the U.S. Geological Survey, Gulf of Mexico Region, paid overtime to workers stranded overnight on offshore drilling platforms. Then the activity determined that this past practice was illegal since stranded employees did not meet the legal requirement of holding themselves in readiness to perform work on a standby basis. It stopped paying the overtime.

Because the past practice was illegal, the Authority said, the employer had no obligation to bargain over its decision. The activity did, however, have a duty to offer the union an opportunity to bargain on the impact of its decision.

A footnote in the case adds that the obligation to bargain on impact and implementation could not justify a delay in correcting the unlawful past practice. *(9 FLRA No. 65—July 21, 1982)*

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New Developments Checklist ...

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FLRA Says Scope of Grievances IS Mandatory Subject of Bargaining

The scope of the negotiated grievance procedure is a mandatory—not permissive—subject of bargaining, the Federal Labor Relations Authority rules, and if the parties can't agree on excluding certain matters, resolution of the impasse can be sought through the Federal Service Impasses Panel.

Accordingly, the Vermont Air National Guard was not unfair when it persisted in its refusal to include adverse actions in the procedure.

Under the Authority's interpretation of 5 USC 7121, negotiated grievance procedures cover all matters which can lawfully be covered, unless the parties mutually agree through negotiations that particular matters will be excluded. The FLRA's General Counsel had unsuccessfully argued that absent "mutual agreement," the party seeking a full scope procedure was entitled to it.

The decision cautions that the party proposing to reduce the scope of the grievance procedure bears the burden in Panel proceedings to justify its proposed reduction. *(9 FLRA No. 92—August 4, 1982)*

In a similar case, the Authority finds that Local 3723, AFGE committed an unfair labor practice by refusing to bargain on a Navy proposal which would limit matters covered by the negotiated grievance procedure. *(9 FLRA No. 93—August 4, 1982)*

Two Union Proposals to Overseas Base Receive Mixed Reception from Court

In a consolidated decision, a federal appeals court sustains one Federal Labor Relations Authority negotiability decision and sends a second back to the Authority for clarification of the union's intent and redetermination by FLRA. The proposals concerned the rationing of products sold at post exchanges, and the number of cars civilian employees can bring duty-free into Korea.

NFFE Proposals to Overseas Military Base

Both proposals were made by Local 1363, NFFE to an army headquarters. The first would exempt bargaining unit employees from dollar and quantity limitations of goods purchased at a PX. In the second, NFFE asked that unit members be exempt from "the provisions of the subject regulation" requiring them to register privately owned vehicles.

The Department of Defense contended that the proposals did not pertain to conditions of employment. It also alleged that army regulations on PX rationing and vehicle registration involve internal security practices and are necessary to limit black market trading.

Further, DOD maintained, the regulations are part of the status of forces agreement (SOFA) between Korea and the United States. As such, they are the equivalent of federal law. The proposals are inconsistent with the regulations and consequently inconsistent with law.

Rejecting DOD's arguments, the Authority ruled that the proposals fall within the definition of conditions of employment in 5 USC 71; do not involve internal security practices; and do not contradict specific provisions of SOFA. *(4 FLRA No. 33 and 34 FLRA No. 4, 1980)*

Court Upholds FLRA Decision on Rationing

The U.S. Court of Appeals for the District of Columbia accepted the Authority's findings on the first proposal.

Judge Abner J. Mikva explained that should this cause difficulties with our military allies, the proper remedy is for DOD to call them to the attention of the President. The President, under 5 USC 7103(b), has power to suspend any of the act's provisions with respect to an overseas activity if the President determines it necessary for national security.

(In fact, Defense had last spring requested an executive order which would exclude its overseas activities from coverage of 5 USC 71).

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PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Valid, Job-Related Reasons for Grievant's Nonselection?

Casefacts: A chapter president of the National Treasury Employees Union was on the list of five candidates entitled to priority consideration for a senior customs inspector position. When another employee was selected, he filed a grievance.

The grievance maintained that the process used to fill the position lacked fairness, objectivity, competitive selection, systematic process and nonpreferential consideration.

Article 17 of the labor contract between the U.S. Customs Service and NTEU states that "Selecting officials must have valid, job-related reasons for nonselections [of candidates due priority consideration], and these reasons must be documented."

The agency's personnel manual also deals with the subject: "An employee referred under priority consideration must be given bona fide consideration for the position."

The selecting official, a chief inspector, testified that in making his choice he used the criteria of personal observation, potential of the candidate, and recommendations of supervisors. He had taken the list of priority candidates and solicited recommendations from five supervisors regarding the best person for the position. None of the suppervisors ranked the grievant as tops.

The chief inspector was unable to interview the candidates because of the pressure of time: one candidate was on leave and the grievant was on a midnight shift. He did not look at their personnel files, and did not review their performance appraisal forms because one candidate's form was lost.

NTEU's specific charges were.

— The grievant received only pro forma consideration;

— The evaluation process did not compare the candidates on job-related criteria;

— Management failed to document why the grievant was not selected. By failing to do so, bona fide consideration was not provided.

In addition, the union alleged that the grievant was not selected bacause his wife had filed an EEO complaint and because of his position as chapter president. Other factors, NTEU said, were that the selectee did not belong to the union and was the cousin of a supervisor.

The agency contended that the grievant had received priority consideration, and that relevant provisions of the contract and personnel manual were properly applied.

Issue; Did the employer violate Article 17 of the parties' agreement or the Customs personnel manual by not selecting the grievant?

Award: Arbitrator Richard B. Peterson ruled for the grievant. Management had violated the contract by failing to show that it had used a valid set of job-related reasons for nonselection, and had not documented such reasons as part of the selection process. The remedy was to give the grievant priority consideration for the next vacancy for senior customs inspector.

The arbitrator found that when soliciting recommendations from his supervisors, the chief inspector did not provide a common set of criteria for them to consider in arriving at their recommendations. This resulted in an unsystematic evaluation of linking the candidates to specific demands of the vacancy.

This, together with the lack of information concerning past performance ratings and promotion potential, resulted in less than the bona fide consideration required by the personnel manual. While not obligatory, it would have been helpful for the selecting official to interview the candidates and review their recent performance appraisals. It would have given him more information to draw on as part of his separate rating of the candidates.

"Supervisory feedback has been found by researchers to be heavily biased toward recency of favorable or unfavorable work performance rather than the performance record over a longer period of time," Arbitrator Peterson noted.

In addition, the chief inspector failed to document his reasons for not selecting the grievant as required by the contract. When dealing with priority consideration, the selecting official must rely on valid job-related reasons for nonselection and use documentation in support of these reasons.

The arbitrator dismissed NTEU's other claims regarding the grievant's nonselection, finding that they were not backed up by concrete evidence, *(U.S. Customs Service, San Francisco Region, and National Treasury Employees Union Chapter 164, October 5, 1982. LAIRS #13672)*

Bench
Marks

Standard of Evidence Set by Court for Denial of Within-Grade Increases

Declining to follow decisions of the Court of Claims and the Merit Systems Protection Board, a federal appeals court rules that an agency denying a within-grade pay raise on the grounds of poor performance must justify its action by a preponderance of evidence. *(Schramm v. Dept. of Health and Human Services, USCA Third Circuit No. 81–2144, June 28, 1982)*

The Claims Court and MSPB had held that all disciplinary actions based on unacceptable performance could be supported only by substantial evidence.

The third circuit says that "The plain language of 5 USC 7701(c)(1) suggests that Congress intended the MSPB to review adverse personnel decisions resulting in reductions in grade or demotion by the substantial evidence standard ... and that every other case must be reviewed by the higher standard [of preponderance of evidence] prescribed in section 7701(c)(1)(B)."

The court acknowledges the ironic result of its ruling is that harsh penalties such as discharge or demotion must by judged by the lesser standard of substantial evidence, whereas the less severe action of withholding an in-grade increase is judged by the tougher standard of a preponderance of evidence.

The third circuit's decision, if it ultimately prevails, has implications for federal labor-management relations under section 7121(e) (2) whereby arbitrators are governed by section 7701(c)(1).

Court Upsets Authority Policy on Pay for Travel, Per Diem

The conflict in court decisions concerning payment of travel expenses for union negotiators continues as the U.S. Court of Appeals for the Eighth Circuit denies enforcement of a Federal Labor Relations Authority order directing such payment. The eighth circuit decision coincides with a finding of the second circuit, but clashes with the ninth circuit's support of this Authority policy. (See *Consultant* of May 7 and July 30, 1982 for articles on earlier decisions.)

At issue is the Authority's Interpretation and Guidance, *2 FLRA No. 31, 1979,* holding that federal employees on official time while engaged in negotiations for their unions are on official business and hence entitled to payment for travel and per diem.

Dispute Seen Going to Top Court

Government agencies have been appealing this interpretation to the courts. In addition to the three decisions cited above, two similar cases are pending. It appears that the dispute is headed toward the Supreme Court for final resolution.

The eighth circuit court considered three areas:

1. *Whether the FLRA construction of 5 USC 71 is entitled to deference.* Although courts generally defer to interpretation of a statute by the agency entrusted with its administration, the eighth circuit did not. It noted that the Authority's policy interprets "official business" in 5 USC 5702, a subchapter administered by the Comptroller General, not by the FLRA.

2. *Whether the legislative history of the act sheds any light on the proper construction of its language.* The court found that the act and its history are silent on travel and per diem payment. "Because we are unwilling to impose additional financial liability on the government without an affirmative directive from Congress, we prefer the interpretation that does not make the government liable for these expenses," Judge Myron H. Bright wrote.

While the decision states that collective bargaining in the federal sector is generally in the public interest, it points out that employee representation in bargaining primarily benefits employees and unions, and only indirectly benefits an agency by contributing to the effective conduct of business.

3. *Whether public policy or other considerations support the FLRA's construction of the act.* The FLRA had reasoned that its policy served the act's purpose by more nearly equalizing the status of the parties. The decisions says that the act's history makes no reference to treating union and management representatives alike in every instance.

Moreover, the act itself creates inequities between them by limiting official time to union representatives only while they would otherwise be in duty status, while placing no such limitation on management representatives.

Split Decision

The eighth circuit decision was by a two to one majority, with Judge Gerald W. Heaney dissenting.

In Judge Heaney's opinion, the court lacks jurisdiction to hear the employer's "belated attack" on the Authority's policy in that the government missed its opportunity to challenge FLRA's interpretation back in 1979 when it was first issued. Further, the court wrongly substitutes its judgment for that of the Authority, exceeding the "deference" standard of review. *(U.S. Dept. of Agriculture v. FLRA and American Federation of Government Employees, USCA DC No. 81–1948, August 9, 1982).*

(continued from page 1)

Court Remands FLRA Decision on Vehicles

The court found the second proposal ambiguous. If the union wants complete freedom from registration or seeks exemption from requirements that track Korean law, then the proposal is inappropriate for bargaining. On the other hand, if NFFE is proposing deviations which are not counter to SOFA and Korean law, the proposal is acceptable.

The D.C. circuit remanded the vehicle registration case to the Authority for clarification by NFFE so that the Authority could redetermine whether the proposal conflicts with express SOFA provisions.

The appeals court decision was by a two to one majority with Judge Ruth B. Ginsburg dissenting. She favors vacating FLRA's orders and remanding the cases for a fresh determination on a developed record of the proposals' inconsistency with SOFA. *(Dept. of Defense, Eighth U.S. Army Garrison v. FLRA and NFEE, intervenor, USCA DC No. 80–2310 and No. 80–2341, August 6, 1982)*

Johnnie's Poultry Case Lives On

In two recent cases the Federal Labor Relations Authority has applied a standard of employer conduct tracking the practices in private sector labor relations. Both cases involve union accusations that the agencies' interviews with employees in preparation for third party proceedings constituted coercive interrogation.

The Authority dismissed the charges, basing its decision on safeguards substantially identical to those the National Labor Relations Board set forth in *Johnnie's Poultry Co., 146 NLRB 770, 1964.*

The Authority ruled that agency management may question bargaining unit employees to asccertain necessary facts in preparation for third-party proceedings, including unfair labor practices and grievances, if management tells employees the purpose of the questioning, assures them that no reprisal will take place, and obtains participation on a voluntary basis.

In addition, the questioning must show no anti-union bias, occur in a context that is not coercive in nature, and not exceed the necessities of the legitimate purpose of the inquiry or interfere with employees' statutory rights.

The Internal Revenue Service in *9 FLRA 132* and the U.S. Customs Service in *9 FLRA 134* were able to demonstrate that their interviews fulfilled these requirements.

In both cases the National Treasury Employees Union further alleged that the interviews were formal discussions at which it had a statutory right to be present. The Authority found otherwise. The meetings were fact-gathering sessions, not formal discussions. *(9 FLRA Nos. 132 and 134—August 16, 1982)*

On the Firing Line

Rejecting most of management's argument, the Federal Labor Relations Authority upholds an arbitration award which reinstated a probationary employee. The authority set aside that portion of the award ordering retroactive career ladder promotion.

The Office of Personnel Management had maintained that the issue was not arbitrable. It also contended that the award was deficient because it was based on the non-fact that the grievant was terminated for unsatisfactory performance in his last assignment. In reality, OPM said, the dismissal was based on poor performance and conduct throughout the grievant's 10 months as a trainee.

The Authority agrees with OPM on one point—that Arbitrator Seymour Strongin's remedy of a retroactive promotion conflicted with the Back Pay Act. It accordingly modified the award. *(9 FLRA No. 78—July 28, 1982)*

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The Federal Labor-Management

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Voice of America Calling

Radio broadcast technicians at the Voice of America won their argument over the interpretation of a contract provision on pay setting. The Federal Labor Relations Authority has upheld an arbitration award directing that paid rest and coffee breaks for technicians be excluded from the calculation of hours worked in determining hourly rates for a 1981 wage survey.

The technicians have the right to negotiate certain aspects of their wages. Their pay is set, consistent with prevailing private sector rates, by means of wage surveys.

The agreement between VOA and the National Federation of Federal Employees contains a formula for calculating the pay schedule. Under the formula, private sector hourly rates are determined by the respective "number of hours *worked* per week." [Emphasis in agreement.]

The question facing the arbitrator was whether the "hours *worked*" should exclude the paid breaks of private establishments. If the breaks were excluded, the surveyed wage rates per hour would be higher and result in higher pay for technicians.

After examining the contract language, bargaining history and past practice, the arbitrator concluded that breaks should be excluded. She ordered implementation of the pay schedule based on such a calculation, retroactive to January 25, 1981.

The agency filed exceptions to the award on the grounds that it was an erroneous finding, contrary to law, a gross misstatement of fact, not supported by evidence, and did not draw its essence from the contract.

VOA failed to prove its case, the Authority ruled, and it rejected the agency's exceptions. *(9 FLRA No. 137—August 16, 1982)*

Election Tainted, FLRA Says

The employer's unfair labor practices against an employee who was active in a union election campaign also interfered with bargaining unit members' freedom of choice, the Federal Labor Relations Authority finds. The Authority accordingly set aside an election in which Local 1482, AFGE was defeated.

The activity had changed the employee's status from regular part-time to intermittent, reduced her work hours, and revoked her "excellent" performance rating. All these actions took place during the period preceding the representation election.

The unit covered 65 nonappropriated fund employees at the Marine Corps Logistics Base in Barstow, California. Only 19 employees voted: 8 for AFGE and 11 for no union.

In arriving at its decision, the Authority took into account the relatively small size of the unit and the centralized work location. It also noted the employee's high visibility as a vocal AFGE supporter.

The FLRA concludes that management's actions were designed to punish her for protected union activity. They conveyed a warning to her fellow workers as to the possible consequences of union support.

It is often difficult to assess how pervasive the impact of an employer's improper actions might be on voters, the Authority comments. The standard for determining whether an election should be set aside is the potential for objectionable agency conduct interfering with the free choice of the voters. *(9 FLRA No. 149—August 20, 1982)*

Authority Reconsiders Ruling in Unit Clarification Case

Although the Federal Labor Relations Authority rarely grants a motion for reconsideration, it did so in a unit clarification case at the Defense Communications Agency. The FLRA's supplemental decision clarified its initial ruling by including certain titles within the bargaining unit.

(continued on page 4)

PM 1.13:

The Arbitration
Roundtable

Parking Lot Confusion

Casefacts: Because the Commandant of the Marine Corps was to visit the Recruit Depot of Parris Island, South Carolina, parking around Maintenance Building 450 was to be restricted on the day of the visit.

About a week before the planned visit, employees who worked in the building were notified that the lot around the building would be restricted to official vehicles. Employees who worked in the carpentry shop were notified by their supervisor at their regular weekly meeting that parking around the building was to be restricted and that employees were not going to be allowed to park in the restricted area. In response to a question from the grievant, the supervisor said that parking would be available in the lot behind an adjacent building.

Written notices were also posted, which stated that no vehicles could be parked in front of or on either side of Building 450.

On the day in question, portions of the parking lot around the building had been roped off. In order to unload his tool box at the building's loading dock, the grievant obtained permission from the Military Police in the area to enter the roped-off area, unload the tool box, and proceed to the outside of the roped-off area. The grievant then parked his truck behind Building 450, which was outside the cordoned area.

Approximately an hour later, the grievant was told by his supervisor that he was "illegally parked." The grievant replied that he "didn't think so. I'm outside the roped-off area."

Later, the supervisor discovered that the grievant's truck was still parked in the lot behind the building. He went to the grievant's work location on the base, brought him back to Building 450 and instructed him to remove his truck. The grievant complied.

Subsequently, the grievant was given a five-day suspension for insubordination. Management argued that the grievant was insubordinate when he parked illegally behind the Maintenance Building, and when he refused to move his truck when his supervisor first ordered him to do so. Further, the agency contended that the penalty was appropriate since the grievant had received a letter of warning for an earlier incident of insubordination.

The union, Local 429 of the American Federation of Government Employees, argued that the grievant was not insubordinate because the agency's instructions concerning the parking lot were unclear and misleading. The union said that the employee had been given confusing instructions on whether or not parking was allowed in the lot behind the Maintenance Building. They also argued that the supervisor's first discussion with the grievant was not clearly understood as an order.

Issue: Did management have cause to suspend the grievant five days for insubordination?

Award: Arbitrator C. Allen Foster upheld the grievance in part and denied it in part.

He held that the verbal instructions and written notice on the parking lot were ambiguous and conflicting. He found that while verbal instructions may not have permitted parking behind the building, the written notice and the MP's actions did not specifically prohibit employees from parking behind the building. Further, he held that the first exchange between the grievant and his supervisor did not result in a direct order to move his truck.

However, the arbitrator noted that the grievant is a person who sought to exploit minor ambiguities in instructions, and continues to do so. This attitude, he said, impedes the orderly administration of civilian personnel at the base. The arbitrator noted that the civilian personnel officer intended the discipline and the experience to bring a problem to the grievant's attention, and to be corrective rather than punitive. He felt that some modification of the grievant's attitude was necessary in order for there to be a "harmonious and mutally beneficial relationship between him and management." Thus, the arbitrator reversed the suspension and ordered it to be removed from the grievant's record. He reinstated the grievant for the five day period without loss of seniority or other benefits. However, the five days pay lost by the employee was not restored. *(AFGE Local 429 and U.S. Marine Corps, Parris Island, South Carolina—July 2, 1982)*

The Labor-Management
FORUM

We Did It Before and We Can Do It Again

Union unfair labor practice charges triggered by nondisciplinary adverse actions carried out by a naval base in Virginia were dismissed by the Federal Labor Relations Authority. The Authority found that the activity followed procedures which were no different from those in the parties' contract or those used in previous changes of employee status.

Local 1625, AFGE had protested management actions which switched the status of two employees from regular part-time to intermittent. The union demanded bargaining, claiming a change in conditions of employment. It further contended that the employer should have bargained over the procedures and impact of its decision.

The employer argued successfully that its decision had to do with staffing patterns, and that it was within its rights in electing not to bargain. Moreover, it had no duty to negotiate procedures and impact because it had already done so when it negotiated the agreement and incorporated negotiated procedures into the agreement. There had been no change in policy or past practice. *(9 FLRA No. 97—August 4, 1982)*

Time Must Have a Stop

A Merit Systems Protection Board decision sets policy for an agency's abbreviation of the 30 day statutory notice of proposed adverse actions normally given employees. The policy, which stems from the so-called "crime provision" of the law, upholds the Federal Aviation Administration's decision to give a seven day notice.

The appellant, an air traffic controller, was arrested for possession of marijuana and released on $8,000 bail. His arrest was covered by the media, and became well-known throughout his agency.

FAA then conducted its own investigation, including an interview with the arresting officer and an attempted interview with the controller. It notified the appellant seven days in advance of his proposed discharge. The dismissal was based on both his arrest and off-duty conduct which occasioned adverse publicity for the agency.

Management pointed to 5 USC 7513(b)(1) as justification for the brief notice. This provision allows the 30 days notice to be shortened to no less than seven days if the employer reasonably believes the employee has committed a crime for which he may be imprisoned.

The MSPB cited an earlier case, *Martin V. Treasury*, where it found that an investivation or arrest accompanied by other circumstances was reasonable cause for invoking the crime provision.

The Board gave examples of accompanying circumstances: arrest coupled with a holding for further legal action by a magistrate; an investigation resulting in evidence supporting reasonable cause; and flagrant actions detrimental to accomplishment of the agency's mission, such as murder or national security offenses, brought to the agency's attention via the news media.

Finding that the FAA's seven day notice met the reasonable cause standard, the MSPB sustained its action. *(MSPB No. CH07528110154)*

The Locked Room Case

The union's proposal to give employees, other than the ones designated by management, access to a locked supply room is nonnegotiable, the Federal Labor Relations Authority says. It would interfere with the right of the Internal Revenue Service to determine its internal security practices. This statutory right includes the right to establish rules safeguarding the agency's property. *(9 FLRA No. 80—July 28, 1982)*

Unit Clarification at EEOC

The Federal Labor Relations Authority agreed with the Equal Employment Opportunity Commission that the incumbents of five disputed positions were supervisors and hence excluded from the bargaining unit. Next, siding with Local 216, AFGE, the Authority determined that incumbents of 16 other positions were neither management officials nor employees engaged in personnel work in other than a purely clerical capacity. The FLRA ruled them unit members.

Two of the 16 titles determined to be in the unit were those of appeals officer and general attorney, both GS 11-13. Employees with these titles are involved with the processing of appeals from final agency EEO decisions.

The employer had argued that because these employees review decisions pertaining to *internal* EEO complaints, they did personnel work. The Authority, however, found that this latter function was minimal, representing about 1 per cent of an individual's case load. This was not sufficient reason to exclude them from the unit. *(9 FLRA No. 136—August 16, 1982)*

(continued from page 1)

In its first decision the Authority had said there were four computer systems analysts who were not supervisors. The agency pointed out that this apparently referred to 15 computer specialists who serve as team leaders. It also said there were four computer systems analysts upon whose status the FLRA had not previously passed.

Defense asked that the specialists be classified as supervisors, and the analysts as management officials.

In its reconsideration, the Authority found that all 19 employees belonged in the bargaining unit. *(Supplemental Decision to 8 FLRA No. 128—August 5, 1982)*

Authority Withdraws Proposed Rule

The Federal Labor Relations Authority has pulled back its proposed rule revision under which the timely filing of an exception to an arbitration award with the Authority would have automatically stayed the award until the Authority resolved the exception.

A notice of the revision was published in the *Federal Register* last November, and comments were solicited. The Authority says now that comments received from agencies, labor organizations and law firms caused it to change its mind. Consequently, section 2429.8 of the Authority's rules will continue unchanged, requiring petitioners to specifically request a stay of an award.

The notice of the Authority's withdrawal of its proposed revision appeared in the *Federal Register* of August 30, 1982.

Union Bid Not Bargainable, FLRA Says

A union proposal which would have blocked management from evaluating employees on new duties for which they had received no formal training was held nonnegotiable by the Federal Labor Relations Authority. To condition the assignment of work on a requirement of formal training would violate the Air Force's reserved right to assign work, the Authority said. *(9 FLRA No. 87—August 3, 1982)*

FLRA Rules on Six Issues in Negotiability Dispute

A federal labor agreement prevails over government-wide rules and regulations in conflict with the agreement *if* the rules are issued after the contract becomes effective. The only rules which cannot be overridden are those dealing with prohibited personnel practices. So finding, the Federal Labor Relations Authority ordered the U.S. Customs Service to bargain on the union's proposals.

This FLRA ruling carries out provisions of 5 USC 7116. Under this section, subsequently-issued government-wide rules and regulations cannot nullify the terms of such a contract, with the exception of regulations governing prohibited practices (e.g. discrimination, favoritism, reprisal, etc.) under 5 USC 2302.

The Authority's decision also covered five other issues in the Customs-National Treasury Employees Union case. Three were found to be negotiable and two not negotiable.

The agency was ordered to rescind its disapproval of those proposals found to be negotiable. *(9 FLR No. 138—August 16, 1982)*

Performance Feedback Meetings Are Improper

The Social Security Administration in Baltimore committed an unfair labor practice when it held "feedback" meetings with bargaining unit employees, the Federal Labor Relations Authority declares, because the sessions constitute a refusal to bargain with the exclusive representative.

The meetings solicited worker input, opinions and sentiment concerning work performance goals. The activity had held the meetings without first obtaining the consent of the American Federation of Government Employees.

SSA contended that it was merely exercising its right to develop performance appraisal systems with employee participation. Moreover, the union's insistence on being the sole conduit for input interferred with management's right to establish standards, determine organization and staffing patterns, and maintain the efficiency of operations.

The Authority, however, viewed the matter as a failure to give AFGE an opportunity to negotiate over the manner in which employee participation in the establishment of performance goals would be provided. *(9 FLRA No. 124—August 6, 1982)*

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Contracting-Out Determination

The Federal Labor Relations Authority finds negotiable a union proposal which would require management to comply with OMB Circular No. A–76 and other applicable laws and regulations on contracting-out. The Equal Employment Opportunity Commission refused to bargain, claiming that the proposal interferes with management's right to make determinations on contracting-out. The agency also contended that it conflicts with OMB Circular No. A–76 by permitting grievances concernig the application of the circular.

The Authority rejected both arguments. It held that the proposal would do no more than incorporate into the agreement what management is already required to do under law and regulation. While the proposal would contractually recognize external limitations on management's contracting-out right, it would not establish, either expressly or by incorporation, any particular substantive limitation on management. The proposal merely requires that when management acts, it must do so in accordance with applicable OMB directives.

The decision contrasted this proposal with a proposal ruled on in *6 FLRA No. 102 (1981)*. In the earlier case the proposal would have incorporated into the contract specific limitations on management's discretion by reflecting particular provisions of the OMB circular. Since management would have to comply with the proposal's terms for the life of the contract—regardless of whether the circular was subsequently revised or rescinded—the FLRA had held it nonnegotiable. The EEOC proposal did not contain these specific limitations.

The FLRA also rejected the employer's contention that the proposal would subject grievances concerning the application of the circular to the negotiated grievance procedure rather than to the procedure prescribed in the circular itself.

Citing *6 FLRA No. 56 (1981)*, the Authority said an agency such as OMB cannot unilaterally restrict the scope of the grievance procedure set forth in law.

The EEOC has filed a request for clarification of this decision as to its relevance to those matters addressed in the circular which do not affect conditions of employment. *(10 FLRA No. 1—September 2, 1982)*

The Opera Isn't Over Until the Last Song Is Sung

It will not consider an exception to the arbitrability of a grievance, the Federal Labor Relations Authority says, until the arbitrator issues a final award. The arbitrator had found the grievance at Kelly Air Force Base arbitrable, but reserved ruling on its merits until a similar case before the authority was decided.

The FLRA told the agency that the case was interlocutory, and that it does not rule on interlocutory appeals. *(9 FLRA No. 155—August 31, 1982)*

SSA's Change in Mileage Reporting Provokes Unfair Complaint by Union

Charges by Local 1823, NFFE that the Social Security Administration's Region 4 had changed conditions of employment without offering the union an opportunity to bargain were upheld by the Federal Labor Relations Authority. SSA's district office, however, was not guilty of an unfair labor practice because it had no choice except to comply with the regional commissioner's directive.

The case began when the commissioner sent a memo to all supervisors in the region requiring that travel vouchers show the mileage reading for each location visited. The memo was to be implemented immediately.

For 20 years the Galveston office had a practice of recording mileage to a given geographical location as "in and around" the location, with appropriate speedometer readings. Under the new requirement, "in and around" would no longer suffice.

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Just a Jurisdictional Dispute

Casefacts: For the past 15 or 20 years certain jobs at the Government Printing Office had been assigned to members of the bargaining unit represented by the Columbia Typographical Union (CTU) No. 101. These jobs were known as running the tubes, picking up the proofs, and pulling the galleys.

In 1981 GPO notified the union that the three jobs would be performed by workers represented by a different union—Local 713 of the International Printing and Graphic Communications Union—and began assigning the duties to IPGCU unit members. Local 101 filed a grievance.

The issue was arbitrable, the union said, since there was a dispute between the parties as to the meaning and application of a contract provision. The disputed provision was the recognition article which defines the unit as employees classified within certain job classifications and assigned to certain positions.

The union contended that this provision, combined with the agency's statutory obligation to bargain on wages, established its jurisdiction over the work within its unit. Consequently, the agency could not unilaterally transfer work out of the unit.

The 1924 Kiess Act (44 USC paragraph 305) mandates that wages at GPO be determined on a craft unit by craft unit basis. CTU maintained that the statutory right to bargain for wages on a unit by unit basis would be undermined if GPO could unilaterally transfer work from one unit into another represented by a different union with a different wage scale. Jurisdictional craft lines would be meaningless if the agency could do this.

Local 101 acknowledged that the contract did not specifically delineate the duties of the three jobs as belonging to a particular position in the unit. Nevertheless, each unit position had normally-assigned duties stemming from past practices. These past practices precluded the agency from transferring work out of the unit.

According to management, the grievance was not arbitrable since there was no provision in the contract limiting the employer's right to assign work or establishing any sort of traditional unit jurisdiction over work. Since there was no agreement provision concerning work assignments, the union was accusing GPO of violating a nonexistent provision.

As to the merits of the issue, the agency argued that it has the unilateral right to assign positions and duties, a right protected by the Civil Service Reform Act. GPO cited decisions by the Federal Labor Relations Council and Federal Labor Relations Authority which supported management's sole right and discretion to assign work and to assign employees to perform the work.

In GPO's view, the Kiess Act did not give the union jurisdiction over the work in its bargaining unit. The law's purpose was to provide a mechanism to establish wages at GPO, not establish work jurisdictions. Further, the agency said, the listing of jobs in the unit was not an agreement on union jurisdiction over the jobs. The employer quoted arbitration awards holding that the listing of job classifications in a contract do not preclude management from changing their job duties.

The agency also cited an earlier arbitration decision determining that GPO was not unfair when it reassigned work previously performed by CTU employees. Lastly, GPO declared that it had never waived its right to asign duties, despite the fact that the work at issue was done for many years by CTU employees.

Issue: Was the grievance arbitrable? If so, did the employer violate the agreement by reassigning duties to employees outside the bargaining unit?

Award: Arbitrator Jacob Seidenberg ruled that the issue was arbitrable, but he denied the grievance on its merits.

The issue was arbitrable since the parties had differing contentions regarding the recognition article as it pertained to transferring work out of the unit.

On the merits of the grievance, the arbitrator found no basis on which to support the union's position. He noted that the Kiess Act is silent on the matter of work jurisdiction. Even when coupled with the agreement, the act does not establish a limitation on management's transferral of work out of the unit.

Arbitrator Seidenberg ruled that in the absence of specific language to the contrary, the mere listing of job classifications in an agreement does not bar management from transferring a job's duties to other employees. In the federal sector, he concluded, management has the ultimate right to assign work unless specifically limited by negotiations. Since he found no negotiated limitation, the arbitrator denied the grievance. *(GPO and CTU No. 101—April 26, 1982. LAIRS #14097)*

BOOKSHELF

Spot Reviews of Publications and Films

OPM's Office of Labor Management Relations reports that 490 bargaining agreements will expire from July 1982 through June 1983. These contracts cover 167,378 workers in non-postal federal bargaining units governed by the Civil Service Reform Act. Of the 490 contracts, 321 can be automatically renewed. About 105 contracts are for two and three year terms.

The calendar below shows the expiration dates of major agreements which will expire during the last three months of 1982. It lists the parties to the contract, location of the unit, number of employees covered, and type of contract. "Auto-open" means agreements with a fixed initial duration, after which no limit is placed on renewals or length of renewal periods. "Auto-limited" means automatic renewal agreements which limit either the number of renewals or the length of renewal periods.

The complete report, *Labor Agreement Expirations in the Federal Service, July 1, 1982—June 30, 1983,* can be ordered from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, telephone 703/487-4650, using purchase number PB82-258351. The price is $7.50 for a paper copy and $4.00 for microfiche.

OPM also announced the updating of its publication on multi-unit agreements. This is a computer-generated listing of federal recognition units covered by a negotiated agreement which includes more than one unit.

Recognitions are shown by agency, and recognitions covered by the same contract have the same multi-unit number within each agency. Each recognition indicates the OPM region in which it is located, the union and its local number, the total number of employees covered by that recognition, and the expiration date and duration of the agreement.

Multi-Unit Agreements in the Federal Service, July 1, 1982 is available from the National Technical Information Service. (See address given above.) The order number is PB82-255977, and it is priced at $7.50 for a paper copy and $4.00 for microfiche.

FEDERAL BARGAINING CALENDAR

October through December

	Parties	Employees Covered	Type of Agreement
OCTOBER			
16	Army Medical Center, Denver, Col.--AFGE 2214	1,164	3 years
16	USA, Fort Bliss, Tex.--NAGE 1489	1,300	auto-limited
23	Patent Office, Arlington, Va.--POPA	1,071	auto-limited
27	Naval Engineering Center, Lakehurst, N.J.--NFFE 23284	1,112	2 years
29	USA, Fort Benning, Ga.--AFGE 54	1,948	auto-limited
NOVEMBER			
5	Travis Air Force Base, California--AFGE 1764	1,015	auto-open
9	HUD, Washington, D.C.--AFGE 222	9,030	auto-open
20	USA, Rock Island Arsenal, Ill.--IAM 81	1,632	auto-limited
22	Naval Air Rework Facilities, San Diego, Calif.--IAM	4,270	auto-limited
DECEMBER			
9	Tooele Army Depot, Utah--IAM 2261	1,547	3 years
12	Bureau of Census, Suitland, Md.--AFGE 2782	1,176	auto-open
12	Bureau of Census, Suitland, Md.--AFGE 2782	2,609	auto-open

(continued from page 1)

When NFFE filed a complaint, the agency argued that its change in past practice was a reserved right of management pursuant to its internal security practices. It also contended that the past practice conflicted with General Services Administration travel regulations.

The Authority rejected the internal security argument. It also said that the agency had failed to show how the Galveston practice was contrary to GSA regulations which merely require that travel vouchers contain sufficient detail to permit proper review by the employer.

The fact that the Galveston office offered to negotiate with the union on the impact and implementation of the memo did not get the commissioner off the hook.

The FLRA stated that when the obligation to negotiate is breached by agency management, such a breach may provide the basis for a ULP "regardless of the location of the agency management in the agency chain of command." *(10 FLRA No. 9—September 15, 1982)*

New Mailing Address for FLRA's Region 3

There's a change in the zip code and mailing address of the Federal Labor Relations Authority's Region 3 office. The new address is:

Washington, D.C. Regional Office
1111 18th St. N.W. Suite 700
Washington, D.C. 20033
Telephone: FTS 653-8452
Commercial 202/653-8452
Mailing address: P.O. Box 33758
Washington, D.C. 20033-0758

Negotiability Question Is Moot

A case involving the negotiability of a "credit hours" proposal under the Federal Employees Flexible and Compressed Work Schedules Act of 1978 is dismissed by the Authority. The act under which the dispute arose expired last July and has been replaced by another law with some substantial differences, the FLRA points out. Consequently, the union proposal is moot.

The parties were told to return to the bargaining table and consider the changed circumstances. If the dispute continues, they can file another petition for review. *(10 FLRA No. 18, September 15, 1982)*

Aggrieved Parties Go to Court for Review of FLRA Decisions

Some 50 appeals of Federal Labor Relations Authority and Federal Service Impasses Panel decisions are pending before federal courts. About two-thirds were brought by agencies and one-third by unions. In certain cases both management and labor appealed the same decision.

The issues involving the largest number of appeals are payment by management of travel and per diem to employees engaged in negotiations; the wearing of military attire by National Guard technicians; and performance standards.

The Veterans Administration and the National Guard are contesting the negotiability of broad scope grievance procedures which include adverse actions. Both agencies maintain that their enabling legislation requires the use of VA and NG appellate procedures and does not permit appeals to an arbitrator. The Third Circuit Court of Appeals earlier this year ruled in favor of the NG on this issue in New Jersey.

The Federal Service Labor-Management Relations Statute, 5 USC 71, allows individuals, labor organizations and agencies aggrieved by a final order of the Authority to seek judicial review.

Detail Is Not Unfair Practice

Management's unilateral detail of an employee to another location for two weeks without first consulting with the union was not an unfair labor practice, according to the Authority's administrative law judge. The ALJ dismissed charges filed by the American Federation of Government Employees against the Social Security Administration in California.

The detailed employee performed telephone duties similar to those she performed on her regular job. Although her detail was a change in conditions of employment, it was not a substantial change. Moreover, it did not have an adverse effect either on the employee who volunteered or on bargaining unit employees.

Since the ALJ's decision was not contested, it was adopted without precedential significance by the Authority. *(Case No. 8-CA-20003, August 27, 1982)*

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82-21

The Federal Labor-Management

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Route to:

FLMC 82-21

October 22, 1982

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When Is a Meeting a Formal Discussion?

Dismissing an unfair labor practice complaint against the Social Security Administration, the Federal Labor Relations Authority lists eight criteria for determining whether management has conducted a "formal discussion" triggering a union's right to be represented.

The complaint arose when a SSA supervisor held individual discussions with bargaining unit employees at which she solicited their comments and suggestions on assignment and distribution of work. The American Federation of Government Employees charged that the meetings were held without notifying the union or providing it with an opportunity to be present, thus violating its representational right.

The Authority said that the union failed to prove that the individual meetings were formal discussions. The stipulated facts did not reveal:

1) Whether the individual who held the discussions was merely a first-level supervisor or was higher in the management hierarchy;

2) Whether any other management representatives attended;

3) Where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere);

4) How long the meetings lasted;

5) How the meetings were called (i.e., with formal advance written notice or more spontaneously and informally);

6) Whether a formal agenda was established for the meetings;

7) Whether each employee's attendance was mandatory; or

8) The manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed). *(10 FLRA No. 24—September 24, 1982)*

Bargaining on Meals Is Not Duck Soup

The maximum value of free meals provided by nonappropriated fund facilities to food service workers is a negotiable matter, the Federal Labor Relations Authority holds. Locals 2670 and 1504, AFGE had asked two activities to increase the maximum value of the meals to $2.00 and 3.50, instead of the current $1.45.

Regulations of the Army and Air Force Exchange Service (AAFES) call for facilities to provide free meals, at a maximum of $1.45 per meal, to food activity employees working four or more hours in U.S. systems. Overseas systems may reduce a meal's value as appropriate.

AAFES argued that the union proposals violated its statutory right to determine the budget. The Authority, however, found that the mere fact that a proposal would result in increased costs does not make an otherwise negotiable proposal violative of the management right.

If a proposal prescribed that a particular program or operation be included in a budget, or prescribed an amount to be allocated, it would conflict with the employer's right to determine budget and would be nonnegotiable. Similarly, a proposal resulting in a significant, unavoidable cost increase, one not offset by compensating benefits, would also interfere with management's right and would be nonnegotiable.

In this case, the AFGE proposals do not contain these prescriptions. Moreover, AAFES did not demonstrate that the allegedly higher costs would not be offset by compensating benefits.

The Authority also shot down the employer's argument that the union propositions conflicted with an AAFES regulation for which a compelling need existed. The agency had contended that a uniform meal value was essential for maintenance of accurate records for payroll and tax purposes.

In the Authority's judgement, the agency had not proved its contention. The agency's own regulation expressly provides for overseas systems to use different maximums. Thus, the regulation itself "tacitly recognizes the lack of essentiality of price uniformity." *(10 FLRA No. 19—September 15, 1982)*

FLRA Overturns Arbitration Awards

Two arbitration awards ordering retroactive

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PM 1.13:

The Arbitration Roundtable

This case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

The Postman Always Rings Twice

Casefacts: On April 16 two union officials hand-delivered a letter to post headquarters at Fort Bragg, North Carolina. Both men were on official time granted for representation purposes.

The letter from the American Federation of Government Employees asked the post commander to review a subordinate's actions in order to avoid costly arbitration of a grievance. The grievance had already been processed through the negotiated procedure, short of arbitration.

The activity grieved the officials' hand-delivery as a misuse of appropriated funds and abuse of contract provisions on official time. It requested AFGE to discipline the two.

It also asked the local to submit an assurance that the delivery of routine mail on official time be terminated, and that in the future these deliveries be made by the U.S. Postal Service or paid AFGE employees.

The president of Local 1770 responded with a five-page letter. He wrote that he had counseled the two representatives "to be ever mindful of their responsibility to act in a manner that inspired confidence and respect, and to strive to maintain constructive relationships in the future."

The letter added that one of the two men, a union vice president, was performing a bona fide representational function—discussing his companion's grievance—and discipline was not appropriate for him.

As to the other man, AFGE asserted that although he operated within the letter of the law, "the appearance of abuse of official time is of too great a concern to this union to consider counseling an adequate measure to resolve this grievance." The president accordingly suggested to the man that he request one hour's annual leave for April 16, and he had done so.

The parties' labor contract requires them to be governed by appropriate laws and regulations. It grants reasonable official time to union officials for representational functions.

The activity argued that this was a routine letter with no suspense date or required management action. The fact that the president counseled the men and that one took an hour's leave indicated the union's guilt. The activity insisted that counseling and leave did not diminish the violation.

AFGE maintained that the hand-delivered letter was an important document. Further, there was a past practice of union representatives delivering numerous non-urgent documents on official time. The local called the grievance part of the employer's campaign to deplete union funds.

Issue: Did the union violate the agreement? Did the grievants' behavior violate 5 USC 7131(a) on official time?

Award: Arbitrator Sherman Dallas denied the grievance because AFGE had not encouraged the errant behavior of the two men.

In no way, he said, could the contract be construed to extend the use of official time to include the hand-delivering of non-urgent, routine mail.

He did not doubt the union's testimony that such delivery was commonplace by union officials. What was lacking was solid, unrefuted evidence that the practice was known and accepted by both parties.

The arbitrator concluded that the men's actions violated the agreement. But this was not what the employer wanted. Fort Bragg wanted a finding that AFGE was responsible for the men's actions. While the union obviously tried—after the event—to cover for the errant officials, the fact remained that the two took it upon themselves to be mail carriers. There was no evidence to the contrary.

The arbitrator could not find the union guilty because the employer had not proved that the men's behavior was instigated or encouraged by the union.

What management should have done was to discipline the two workers. Instead it asked the union to take care of the matter. The union did, in essence, take disciplinary action against the two. As to the remainder of the employer's demand, it was unnecessary in the light of the union's reluctant admission of the workers' guilt.

Arbitrator Dallas pointed out that a union cannot discipline management representatives and must use the grievance procedure to protest management actions. The employer does have authority to discipline.

"For reasons that perplex the arbitrator, the employer chose to forego its right to discipline the two officials. Had management done this, and its discipline was reasonable, the arbitrator would have found for the employer and sustained the disciplinary actions." (*Hq. XVIII Airborne Corps and Fort Bragg and Local 1770, AFGE—March 5, 1982. LAIRS #14014*)

Thirty-Fourth Annual Report of Federal Mediation and Conciliation Service

In its annual report for Fiscal Year 1981, the Federal Mediation and Conciliation Service recounts the following story concerning the Philadelphia Navy Shipyard.

The U.S.S. Saratoga was due to arrive at the shipyard with such notables as the Vice President, governors of three states, mayor of Philadelphia, and about 50 senators and congressmen on board.

FMCS had been involved in six meetings with the Metal Trades Council (made up of 22 unions) and the U.S. Navy, but had not yet been able to get agreement on a new contract. Rumors were flying that on the day of the ship's arrival the union was going to put up informational pickets, an act that might embarrass the Navy as well as the guests.

The Service's regional director and two seasoned mediators put their persuasive powers to the test and got an agreement that no picketing would take place, and that negotiations would continue.

The ship and the guests arrived. Everything was shipshape. Talks continued, and after nine additional meetings a contract satisfactory to both sides was reached.

The shipyard incident is one illustration of how federal mediators assist at the bargaining table. They have assisted in a steadily increasing number of federal cases—from 101 in FY 1971 to 393 in FY 1981.

FMCS has provided mediation and other help in negotiation disputes between federal agencies and labor organizations since issuance of Executive Order 11491, effective in 1970. Enactment of the Civil Service Reform Act of 1978 translated the agency's role into law.

Section 7119(a) of the CSRA states that "The FMCS shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance."

The FMCS regulations authorize it to provide assistance in Federal bargaining disputes on its own motion, or at the request of one or both parties. It may set time limits on its participation and make recommendations to the parties for settlement when it determines such procedures are appropriate.

The regulations require that the party initiating bargaining must notify FMCS within 30 days after commencing negotiations. These requirements, however, do not apply to mid-term or impact bargaining.

Arbitration Costs Are Going Up

Another section of the annual report deals with arbitration costs. Combined data on public and private sector arbitration cases show a 12 percent increase in costs—from $1,011.74 per case in FY 1980 to $1,132.31 in FY 1981. As indicated in the chart below, the increase was caused by higher fees and expenses of arbitrators.

The number of days for which arbitrators charged (a combination of travel days, hearing days and study days) also rose. The average for total days charged was 3.21 days in FY 1980 and 3.32 in FY 1981.

These figures come from the Service's Office of Arbitration Services. OAS maintains a roster of arbitrators, and upon request submits panels of arbitrators to parties with disputes under labor agreements. It also assists in establishing and administering permanent panels of arbitrators for industries, agencies and unions.

Average per diem rates, fees and expenses charged by arbitrators based on closed arbitration award cases sampled for fiscal years 1971 through 1981

	1971	1975	1977	1979	1980	1981	
Arbitrator's per diem rates, fees and expenses charged	Dollar amount	Dollar amount	Dollar amount	Dollar amount	Dollar amount	Dollar amount	Percent change from FY 80
Per diem rate..........	$163.88	$192.30	$216.99	$265.95	$ 274.71	$ 299.62	+ 9.1
Total charged..........	566.59	621.31	733.04	911.83	1,011.74	1,132.31	+12.0
Amount of fee........	480.88	550.81	644.70	804.51	883.59	988.76	+12.0
Amount of expenses....	85.71	70.50	88.34	107.31	128.15	143.55	+12.0

(continued from page 1)

promotions are set aside by the Federal Labor Relations Authority because they violated the Back Pay Act. In a case involving the U.S. Army Air Defense Center and Local R-14-22, NAGE, the Authority found the arbitrator erred by ordering retroactive pay for two employees whose promotions were unduly delayed.

The FLRA said the award would have been lawful if the delay had occurred *after* the promotions were approved by a properly authorized official. Here, however, the delay (occasioned by promotion freezes) occurred *before* such approval was given. *(10 FLRA No. 32—September 29, 1982).*

Using the same reasoning in a similar case, the Authority found deficient an award directing the Social Security Administration to retroactively promote an employee. *(10 FLRA No. 33—September 29, 1982).*

The Bus Stops Here

The Federal Labor Relations Authority has ruled negotiable a proposal on shuttle buses made by the union to the Justice Department's Board of Immigration Appeals. This proposal and three others were precipitated by the board's move from Washington, D.C. to northern Virginia.

The American Federation of Government Employees wanted shuttle bus service between Justice's main building in D.C. and the board's new location. The service was needed, the proposal read, because public transportation was inadequate to insure that employees reached work on time. In addition, the shuttle would give workers access to research facilities in D.C. and such department services as the credit union and health unit.

The employer objected to the proposal on the grounds that access to research facilities concerns the technology, methods and means of performing work. This is an area of management's reserved authority, bargainable only at management's option.

The FLRA rejected the agency's claim since the proposal is not principally related to the work of ruling on immigration appeals. The transportation principally impacts on the working conditions of employees adversely affected by the move, and is only incidental to the performance of the bureau's work.

The employer also contended that the proposal conflicts with its statutory right to determine its organization. Further, the authority to procure a motor vehicle rests with Justice's assistant attorney general for administration, not with the board.

The FLRA responded that 5 USC 7106(a)(1) "does not reserve to management the right to foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level above the level of recognition and bargaining."

In short, management has a duty to be represented at the bargaining table by persons empowered to negotiate and enter into contracts on all negotiable items.

The employer's final argument was that the buses would not be used exclusively for official purposes, thus violating 31 USC 638a.

The Authority observed that the employer was using an overly restrictive interpretation of the law. If the agency determines within its administrative discretion that a vehicle is used for official purposes, then transportation of other employees—incidental to such use— would not necessarily be inconsistent with law.

AFGE presented three other proposals on parking facilities, relocation of jobs, and affirmative action hiring. Terming the proposals "nonspecific," the Authority found they did not meet its conditions for review. *(10 FLRA No. 17—September 15, 1982)*

Authority Finds No ULP at Library

The Library of Congress did not commit an unfair labor practice when it refused to let an employee have union representation at a counseling session, the Federal Labor Relations Authority's administrative law judge determines. The purpose of the meeting was to advise him of his shortcomings in job performance and to warn him that he would face discipline if he did not improve.

The ALJ ruled that since the meeting was not an examination in connection with an investigation which might result in disciplinary action, the employee had no Weingarten right to representation under 5 USC 7114(a)(2)(B).

Because no exceptions were filed to the ALJ's dismissal of the union's complaint and it was nonprecedential, the ALJ's decision became the decision of the Authority. *(Case No. 3-CA-741, August 31, 1982)*

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82-22

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November 5, 1982

New Developments Checklist ...

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Court Affirms FLRA Policy on Performance Standards

Companion opinions by an appeals court have upheld rulings of the Federal Labor Relations Authority which declare that performance standards and identification of critical job elements are not subject to collective bargaining between federal agencies and unions.

The U.S. Court of Appeals for the District of Columbia Circuit concluded that while the 1978 Federal Service Labor-Management Relations Act requires agencies to bargain over conditions of employment, the statute also gives management the exclusive right to assign work and direct employees.

"Without a doubt, the right to determine what work will be done and by whom and when it is to be done, is at the very core of successful management of the employer's business, whether a private sector enterprise or the public operations of a federal agency," Chief Judge Spottswood W. Robinson III wrote.

That "invaluable right," Robinson said, is essential to management's ability to achieve maximum productivity and to the agency's ability to function effectively.

He added that the Authority's decision in *3 FLRA No. 119 (1980)* to preserve that right to management complied with the Congressional command that the law be interpreted "in a manner consistent with the exigencies of efficient government." The decision had been contested by the National Treasury Employees Union. *(NTEU v. FLRA, USCA DC No. 80-1895, October 12, 1982)*

The chief judge observed that the Authority left unions the right to bargain collectively on the procedural aspects of performance appraisal systems, as well as on the impact and implementation of management decisions concerning performance appraisals. Unions cannot, however, negotiate on the standards themselves.

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The decision also noted that employees may challenge an established performance standard in the context of a grievance concerning disciplinary action for unacceptable performance. The employees may claim that the standard by which their performance was measured is not "objective or not job related, or it is inherently impossible of performance."

Relying on its reasoning in the NTEU case, the D.C. circuit rejected arguments raised by the American Federation of Government Employees in its petition for review of *5 FLRA No. 14 (1981).* The union maintained that the act's definition of "conditions of employment" included performance standards and critical job elements.

The court reiterated that these matters are nonnegotiable because to bargain on them would directly interfere with management rights. *(AFGE v. FLRA, USCA DC No. 81-1274, October 12, 1982)*

Authority Does About Face on ULPs In *Ex Parte* Arbitration Proceedings

In light of a court decision, the Federal Labor Relations Authority has reversed its earlier policy whereby one party's refusal to participate in an arbitration proceeding was not an unfair labor practice, since the other party could always proceed to arbitration on its own. The Authority now says that *it is a ULP* if a party is unwilling to participate in arbitration proceedings.

Earlier this year the U.S. Court of Claims indicated that an arbitrator who proceeds with an *ex parte* arbitration may not be entitled to recover the portion of his or her fees which would otherwise be payable by the agency which specifically refused to continue with the arbitration of a labor-management dispute. *(Ables v. United States, U.S. Ct. Cl. No. 666-80C, March 26, 1982)*

Citing the claims court ruling, the FLRA reasoned that if an agency declines to proceed to or participate in arbitration proceedings pursuant to a negotiated grievance procedure, the union might be impeded in submitting unresolved griev-

(continued on page 4)

PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

A Bloodless Absence

Casefacts: Because of a critical blood shortage in the Albany, Georgia area, the American Red Cross conducted an emergency blood drive at a hospital near the U.S. Marine Corps base. The grievant, a warehouseman at the base, was among the employees who volunteered to give blood on Friday afternoon, July 17.

The Red Cross rejected the grievant as a donor because of his high blood pressure. The warehouseman then went home instead of reporting back to work. On Monday he did not mention to his supervisor that he had not donated blood.

On Tuesday the supervisor received a phone call indicating that the warehouseman had not given blood. The supervisor asked the grievant if he had a card showing that he had donated blood on Friday. The grievant answered that he did, and his boss asked him to bring the card in the next day.

On Wednesday, when the supervisor approached him about the card, the warehouseman responded, "They don't give blood donor cards any more."

The supervisor next asked the grievant if he had given blood on Friday. The employee explained that Red Cross personnel had refused him as a donor and someone had instructed him to go home. To the supervisor's question as to why he didn't call work and ask for leave, the grievant answered that he "just didn't."

The activity subsequently suspended the warehouseman for three days due to his unauthorized absence on July 17. It recorded his leave status for that day as one and one-half hours administrative leave and two hours unauthorized leave.

The employer contended that the grievant violated a base order and the directive calling for volunteers. Both the order and directive state that employees participating in a blood drive are granted up to four hours administrative leave, while those rejected as donors are required to return to work immediately.

The parties' contract calls for notification of incapacitation for duty to be made to the employee's supervisor, or to a person authorized to accept such notification.

At the arbitration hearing, the activity pointed out that in June the grievant had received a letter of reprimand for an unauthorized absence. This made the July 17 incident a second offense. The supervisor testified that on several occasions he had him counseled concerning the policy. Moreover, the supervisor had warned him on July 17 that if he were rejected as a donor he must return to work immediately.

The American Federation of Government Employees contended that the grievant did not return to his job on Friday because he was advised by a nurse to go home and rest. The grievant testified that when he reached home he attempted to call his supervisor.

The union alleged that the grievant's discipline for unauthorized absence was inconsistent with treatment of other employees for the same type of offense. In the past 10 years not a single individual had been disciplined for attempting to give blood, being rejected, and failing to return to work. Management rebutted that there had been no disparate treatment since the circumstances were different in this case. The grievant was treated like any other employee absent without authority.

Issue: Did the grievant violate the contract by suspending the grievant for three days?

Award: Arbitrator Lloyd L. Byars denied the grievance.

It was uncontested, he said, that the grievant did not report back to his supervisor after his rejection, even though he admitted that he was aware that the rules require this and his supervisor had told him to return if he could not give blood. It was also uncontested that he did not ask for sick leave or inform his supervisor that he did not give blood.

This evidence convinced the arbitrator that the grievant was attempting to retain administrative leave although he was aware that he had not fulfilled his obligation to retain that leave.

The grievant's alleged call to his supervisor did not fulfill his contractual obligation to notify his supervisor or other authorized person. Further, comparing the grievant's case with other cases presented by the union, Arbitrator Byars could not find that the circumstances were similar. And finally, this was a second offense.

Because of the grievant's hesitation in responding honestly to his supervisor's queries as to whether he gave blood, and because he had been counseled in this matter, Arbitrator Byars found that the supervisor made a reasonable decision to suspend the grievant for three days. *(U.S. Marine Corps Logistics Base and American Federation of Government Employees—July 21, 1982. LAIRS 14306)*

The Labor-Management FORUM

Arbitration Award Conflicts With Back Pay Statute

An arbitration award is set aside by the Federal Labor Relations Authority on the grounds that it violates the Back Pay Act. The arbitrator had ordered the San Antonio Air Logistics Center to retroactively pay 22 workers.

The case concerned a group of employees who were placed in an upward mobility program in January 1979. The employees voluntarily accepted a grade reduction in order to enter the program. The activity determined that they were entitled to pay retention benefits, and set their pay accordingly.

When the Office of Personnel Management subsequently issued interim regulations to implement 5 USC 5361-5366, the employer learned that the employees were being paid more than the amount permitted under the new rules. The center reduced their pay and gave them only a partial amount of a comparability increase in scheduled pay rates.

The arbitrator judged that the employees were entitled to grade retention benefits under section 5362 and ordered payment of full comparability from October 1979.

The Authority ruled that grade retention is permitted only if it results from a reduction-in-force or reclassification. Section 5363 entitles employees in upward mobility programs to pay retention, not grade retention. The FLRA found that the center had established proper pay rates, and its adjustments were in accord with laws and regulations. *(10 FLRA No. 31—September 28, 1982)*

Put Back the Clock

The Internal Revenue Service's decision to exclude some "crossover" employees from a training program, without first offering the union an adequate opportunity to negotiate on the implementing procedures and arranagements for adversely affected employees, was an unfair labor practice, according to the Federal Labor Relations Authority. Its order directed the employer to return to the preexisting practice. Authority member Leon B. Applewhaite dissented from the *status quo ante* remedy.

Under the remedy, IRS is to restore the participation of crossover employees in the program; notify the National Treasury Employees Union of the intended change; and, if requested by the union, bargain on the impact and implementation of the change.

The Authority said its remedy was warranted because certain employees lost a training opportunity intended to qualify them for the revenue agent series. In contrast, the program was being continued for other groups of workers.

Weighing the impact of management's decision on affected employees against the apparently minimal disruption to agency operations caused by a return to preexisting conditions, the Authority concluded that a *status quo ante* remedy would best carry out the purposes and policies of the federal labor relations law.

The FLRA emphasized that the activity's decision to discontinue training for a group of workers was not in itself negotiable. The decision involved the exercise of management's reserved right to assign employees.

Member Applewhaite's minority opinion agreed that IRS was guilty of a ULP. He did not judge, however, that the situation called for such a remedy. *(10 FLRA No. 61—October 8, 1982)*

Union Not Covered by Savings Clause, Can't Bargain on Wages, FLRA Rules

A call-back provision in an earlier contract does not establish that Local 2080, IAM negotiated wages and terms of employment in the past, the Federal Labor Relations Authority rules, and the union is not covered by a 1972 law which allows continuation of bargaining on money matters. Consequently, proposals on pay practices made by IAM to the U.S. Corps of Engineers in Nashville, Tennessee are not bargainable.

The three proposals asked that employees receive time and one-half for hours worked which did not comply with contractual work scheduling provisions; receive double time for Sunday overtime; and be paid a minimum of four hours call-back even if they did not work the full four hours.

IAM argued that it was covered by the savings clause of PL 92-392 of 1972. The clause, section 9(b), says that prevailing rate employees who negotiated on terms and conditions of employment prior to the law's enactment could keep on doing so. The provision was continued by section 704 of the Civil Service Reform Act of 1978.

In the Authority's judgment, the clause did not apply. Further, the first two proposals concerning premium pay are excluded from bargaining by law, since premium pay is handled under 5 USC 5544.

The third proposal is not bargainable because it conflicts with a government-wide regulation which allows only a two-hour call-back. *(10 FLRA No. 43—September 30, 1982)*

(continued from page 1)

ances to binding arbitration, as mandated by Congress.

Further, the exclusive representative might also be obstructed by a requirement to pay the entire costs of the arbitration proceedings, contrary to Congress's intent in enacting section 7121 of the Civil Service Reform Act (CSRA) of 1978.

The case before the Authority arose from a dispute between the Department of Labor and the American Federation of Government Employees. The employer denied the union's request for arbitration involving termination of a probationary employee, asserting that the matter was excluded from the scope of grievances by the CSRA, and was untimely filed.

The Authority determined that because the Labor Department and AFGE had not mutually agreed otherwise, their negotiated grievance procedure must be read as providing that all questions of arbitrability must be submitted to arbitration.

Under law, the FLRA explained, either party may invoke arbitration on issues involving questions of arbitrability. A dissenting party could not prevent the arbitration from proceeding by refusing to participate.

In prior cases, *7 FLRA No. 23 (1981)* and *8 FLRA No. 12 (1982)*, the Authority had held that it was not unfair for either party to not participate in an arbitration proceeding as long as the other party could proceed to *ex parte* arbitration. But under the Authority's latest ruling, the previous decisions will no longer be followed.

Consequently, FLRA advised, Labor's refusal to proceed to arbitration put the agency in noncompliance with section 7121 and was a ULP. *(10 FLRA No. 60—October 8, 1982)*

Authority Reviews FY 1982

The Federal Labor Relations Authority reports it issued a record number of decisions in the last fiscal year. During FY 1982, which ended September 30, the Authority issued 636 decisions—an increase of 52 percent over the 418 decisions issued in FY 1981. As a result, the number of pending cases was reduced by 12.4 percent, from 813 cases at the beginning of the year to 712 at the end.

Of the 636 decisions issued, 144 were negotiability decisions in which the Authority ruled on 289 distinct proposals. These decisions resolved many areas of concern and thus established parameters to the scope of the duty to bargain under the statute.

Sign on the Dotted Line

When nonunion-member employees of the bargaining unit sought assistance from Local 1778, AFGE, they were presented with a dues withholding form and an affidavit of charges under which they agreed to defray the union's expenses in representing them. The local did not notify employees that it would represent them regardless of whether or not they signed a form. This AFGE behavior constituted unfair labor practices, the Federal Labor Relations Authority rules.

The union's actions interfered, restrained and coerced federal employees in the exercise of their rights under 5 USC 71. In addition, solicitation of membership while union representatives were on official time was a refusal to comply with provisions of the act.

As a remedy, the AFGE local at McGuire Air Force Base, New Jersey must give two employees who became members 60 days to revoke their dues deductions. If the two decide to revoke, AFGE must reimburse them for dues withheld.

In the future, the local must give clear notice to all non-member employees that they are not required to sign a checkoff form or an agreement to pay representation costs as a precondition to receiving representation.

The local is also required to post copies of the Authority's notice at its business office, normal meeting places, and bulletin boards. *(10 FLRA No. 62—October 8, 1982)*

Air Force Not Guilty of ULP

Reiterating its policy in earlier decisions, the Federal Labor Relations Authority says management has no obligation to grant official time for employees of one bargaining unit who are designated as union representatives in contract negotiations covering employees in another unit.

The ruling upheld arguments by the Air Force Logistics Command and the Office of Personnel Management, as intervenor, that the employer was not guilty of an unfair labor practice when it refused to grant official time to these employees. *(10 FLRA No. 46—September 30, 1982)*

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November 19, 1982

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Court Upholds Right of Judiciary To Issue Anti-Strike Injunctions

A federal court has once again dealt a blow to the argument that the Federal Labor Relations Authority has exclusive jurisdiction over unfair practices involving strikes. In conformity with two other appellant court decisions, the U.S. Court of Appeals for the Fifth Circuit found that federal courts may issue injunctions to block strikes by federal workers. *(U.S. v. Martinez, et al, USCA 5th Cir. No. 81–3538, September 24, 1982)*

The case stemmed from the nationwide walkout by the Professional Air Traffic Controllers Organization which began in August 1981. A U.S. district court had convicted six controllers on criminal contempt charges for violating its injunction against the strike.

The controllers appealed their sentence on several points. One was that the Civil Service Reform Act (CSRA) of 1978 upset the traditional power of the courts to enjoin strikes. The fifth circuit upheld the convictions of four controllers, but dismissed two convictions for failure to prove participation in the strike.

The court said that "Nothing can be found in American law that even hints that a strike against the U.S. government, illegal beyond any question, is not subject to injunction."

Its ruling agreed with second and seventh circuit decisions. The sister courts had struck down PATCO contentions that the CSRA empowers only the Authority to request injunctive relief for strikes as unfair labor practices and that the act gives no role to other federal agencies. *(Air Transportation Association of America v. PATCO,* 667 F.2d 316, 2nd Cir. 1981 and *U.S. v. PATCO,* 653 F.2d 1134, 7th Cir. 1981)

The prior court decisions found that laws on federal strikes passed before the CSRA could not be disregarded. One such law prohibits strikes and allows them to be enjoined; the other has criminal penalties for strike actions.

The earlier decisions held that "Congress in enacting Title VII did not intend to preempt existing remedies for strikes by federal employees."

FLRA Won't Upset Arbitration Award

An arbitration award holding that a nonprofessional employee could not be reprimanded for unprofessional behavior is sustained by the Federal Labor Relations Authority. The grievant, a service representative at the Social Security Administration, was a member of a bargaining unit made up entirely of nonprofessional employees.

Under the agreement between the SSA and the National Federation of Federal Employees, "Employees and management shall conduct all relationships with courtesy and professionalism."

The arbitrator determined that it was uncertain what parties intended by the term "professionalism," inasmuch as no definition appeared in the contract. He himself understood it to involve characteristics of a profession such as law and medicine. In his view, the reprimand was not supported by the contract.

The agency filed an exception, arguing that the arbitrator refused to apply a contractual provision to the unit employees it was negotiated to cover. Consequently, the award did not draw its essence from the agreement, and the arbitrator had exceeded his authority.

In disagreement, the Authority noted that it was the arbitrator's construction or interpretation of the agreement for which the parties had bargained. An award could not be undermined as not drawing its essence from the agreement merely because a party believed that the arbitrator had misinterpreted the contract.

The Authority reiterated that for an award to be found deficient as failing to draw its essence from the contract, it must be established that 1) the award is so unfounded in reason and fact and so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; or 2) that the award on its face does not represent a plausible interpretation of the agreement; or 3) that the award cannot in

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PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Furor over Fumes

Casefacts: For six months workmen repairing the roof of the Kansas City Service Center of the Internal Revenue Service had been applying a roofing compound. Although the process caused an obnoxious tar or sulphur smell, center officials were assured by the General Services Administration, its consultants and later by OSHA investigators that the fumes were nontoxic and harmless.

On October 24 the roofers were working directly over the Data Conversion Branch where sections of ceiling tile had been removed because of leaks. Data transcribers' eyes began to burn, but since it was late in the afternoon they were able to finish the shift.

The next two days some 30 to 40 branch employees went to the health unit because of headaches, dizziness, nausea and sore eyes and throats. The branch chief announced a liberal policy of sick and annual leave. Large fans were brought in to dissipate the fumes.

One employee who stuck it out on Thursday was told by the nurse to go outside periodically for 15 minutes of fresh air. Others held wet paper towels over their noses. Two people fainted and were taken away in wheelchairs.

Twenty-two workers took leave because of the fumes. They filed grievances.

The IRS-National Treasury Employees Union contract requires the employer to provide and maintain safe working conditions for all employees. Further, "Whenever it becomes necessary to move an employee from a work area because of conditions or practices ... which pose a threat to that employee's health or physical safety, the employer will make every effort practicable to find work for that employee elsewhere in the center."

The branch chief testified that employees were permitted to move from assigned work stations to other computer terminals if it would help them escape the fumes. She had so informed her section chiefs who in turn were supposed to tell the unit supervisors. However, all but one of the union witnesses denied that they were offered the opportunity to move.

An IRS official who had climbed up on the roof said that three air intake vents which should have been closed were wide open, and winds were blowing fumes directly into the branch. He ordered the roofers to close the two vents and put a tarpaulin over the third. When he came back the next day he discovered that the tarp had been removed and more vents were open.

Management emphasized that although odors were unpleasant on October 25 and 26, they were not hazardous to health or safety. It pointed out that as the project moved along, employees in other departments had complained about the fumes but had not been made ill.

NTEU rejoined that the fumes were heavier in the branch because of the missing tiles. The stream of workers to the health unit should have indicated that something was wrong.

Issue: Did the agency violate the contract by failing properly to provide for the employees' health and safety on October 25 and 26? If so, were the grievants entitled to administrative leave in lieu of the leave taken?

Award: Arbitrator John E. Dunsford upheld the grievance and directed the employer to restore the grievants' sick and annual leave. If the achievement of this result required retroactive granting of administrative leave, then this was part of the remedy.

He observed that while center officials conscientiously sought to alleviate the working conditions, they had not considered evidence showing that conditions on the two days in question were worse than before. While other workers had complained previously, none experienced physical symptoms, had to breathe through wet towels, or go out for air.

One might wonder, the arbitrator said, whether the grievants' reaction to the fumes was not overwrought and exaggerated in contrast to that of employees in other departments. Nevertheless, the circumstances of the intake vents and missing tiles provided a factual basis for their strong reaction.

Dunsford ruled that the contractual phrase "threat to health" encompassed temporary and transient illnesses produced by working conditions, as well as those of a life-threatening nature.

Even though IRS maintained that it had made "every effort practicable" to find work elsewhere for the grievants, the arbitrator found no reliable showing that the branch chief's message was ever communicated to employees.

IRS was not contractually free to expect employees to continue at work in unhealthy conditions or else use personal leave. The burden of avoiding objectionable working conditions could not be placed on employees. *(IRS and Chapter 66, NTEU—November 25, 1981. LAIRS #13742)*

The Labor-Management FORUM

Unit Clarification at Air Force

A GS 14 General Engineer at Eglin Air Force Base, Florida is not a management official, the Federal Labor Relations Authority decides, because his actions assist in implementing—as opposed to shaping—his agency's policies. Hence, he should remain in the bargaining unit.

The Authority further found that the engineer is not a supervisor. While he has some responsibility for assigning work to certain employees and directing them in its performance, his functions are routine in nature and do not require the consistent exercise of judgment.

Of four other disputed positions, the Authority found two to be supervisors and excluded from the unit, and two not to be supervisors. *(10 FLRA No. 66—October 22, 1982)*

Our readers tell us that they enjoy the Arbitration Roundtable stories regularly appearing on page 2 of the *Consultant.* These cases come from OPM's Labor Agreement Information Retrieval System (LAIRS) file of arbitration awards. Completeness of our files depends on agencies forwarding copies, in compliance with FPM Letter 711-160, July 13, 1981.

One effective way utilized by the Federal Prison System and the Council of Prison Locals, AFGE was to write into their contract's arbitration procedure that "The arbitrator shall forward copies of his/her award to the parties, the **Office of Personnel Management** and the Department of Justice, Labor-Management Relations Office."

Paycheck Checkmate

To resolve a bargaining stalemate between an army military district and Local 2, AFGE, the Federal Service Impasses Panel has ordered the parties to adopt the union's proposal regarding the date on which employes receive paychecks.

Currently, the checks are either mailed to workers on the first Thursday following the end of the pay period, or delivered at the work site the next day.

The employer wanted to change the payday to the second Thursday after the pay period. The advantages, management said, were the elimination of overtime needed to maintain the current practice, and the achievement of greater accuracy. Further, its proposal was consistent with General Accounting Office recommendations to improve the district's payroll system, as well as with the practice in other army offices.

The union wanted payday to be the first Friday following the close of the pay period. Checks would be delivered to employees on site on Friday or put in the mail that same day.

According to AFGE, the army's proposal would impose an undue hardship on workers. Its own suggestion, it claimed, accommodated management's concerns by providing more time to process checks which had to be mailed. It was also consistent with practices at other offices in the area.

Without comment, the Panel directed the parties to accept the AFGE proposal. The Panel's decision was based on written submissions from the parties. *(Case No. 82 FSIP 119—October 15, 1982)*

Exempt Privilege Applies to Documents in ULP Settlement Case, Court Holds

Materials used by the Federal Labor Relations Authority in resolving an unfair labor practice complaint need not be disclosed to the party seeking court review of the settlement decision. This ruling by a federal appeals court denies a union steward's bid for disclosure of documents relied on by the FLRA's General Counsel in dismissing the stward's complaint against the Environmental Protection Agency. *(Turgeon v. FLRA, USCA DC No. 81-2275, September 30, 1982)*

The U.S. Court of Appeals for the D.C. Circuit explained that the papers were protected by the privilege against disclosure of the Authority's deliberative process and the attorney work-product privilege.

In a separate case the steward had challenged the GC's dismissal of his unfair complaint. Last May the same court ruled that it had no jurisdiction because the GC has unreviewable discretion not to issue ULP charges. (See *Consultant*, July 2, 1982)

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any rational way be derived from the agreement or evidences a manifest disregard of the agreement.

In the FLRA's majority judgment, the agency failed to prove that the award did not draw its essence from the contract or that the arbitrator exceeded his authority, even though "we do not necessarily agree with" his interpretation of "professionalism" as used in the agreement. The majority opinion was written by Chairman Ronald W. Haughton and Member Henry B. Frazier III.

Member Leon B. Applewhaite dissented, on the grounds that the award did not draw its essence from the agreement and should therefore be reversed. *(10 FLRA No. 73—October 29, 1982)*

Authority Sees Clear Sailing For Pilots Supervisory Unit

A worldwide bargaining unit composed entirely of supervisors has been declared appropriate by the Federal Labor Relations Authority. The unit covers all civilian maritime pilots employed by the Navy. The Authority judged that the federal labor law allows recognition of supervisory groups traditionally recognized in private industry.

The International Organization of Masters, Mates and Pilots, which filed the representation petition for 52 pilots and chief pilots, contended successfully that all of them are supervisors.

The union proved that it has historically represented private sector supervisors. Further, it holds and has held exclusive recognition for a supervisory unit at the Military Sealift Command prior to 1978.

Section 7135(a)(2) of USC 71 lists specific prerequisites for the initial according of recognition for a unit of supervisors. The unit must be represented by a union which "historically or traditionally" represents management officials or supervisors. In addition, the labor organization must have been the exclusive representative for such a unit in any federal agency on the effective date of the statute.

The Authority found that Masters, Mates and Pilots had satisfied the law's requirements. *(10 FLRA No. 64—October 15, 1982)*

OPM's Request for Injunction Denied

The Office of Personnel Management lost its bid for a court stay of an arbitration award when the U.S. Court of Appeals for the District of Columbia denied the agency's request. OPM, which is challenging the award in court, sought to prevent the grievant's reinstatement until the legality of the award could be determined. *(Devine, Director v. Pastore, et al, USCA DC No. 82-1716, October 14, 1982.*

The arbitration case concerned a U.S. Customs employee who was fired for alleged theft. Arbitrator Joseph M. Pastore found the grievant guilty. However, the employee's good work record and Customs' past practice of meting out less severe penalties for similar offenses warranted a 31-day suspension rather than a discharge, Pastore said. He ordered the grievant reinstated with back pay.

The D.C. Circuit's brief decision cites two cases as the basis for its refusal to grant an injunction. One of the two, *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, DC Cir. 1958, is a classic decision which lists four factors considered sufficient grounds for granting an injunction.

The factors are: a substantial indication that the peitioner is likely to win the case; a showing that without a stay the petitioner will be irreparably injured; a demonstration that other interested parties will not be harmed by a stay; and a showing that a stay will not harm the public interest.

Authority Nixes NTEU Proposal

The Federal Labor Relations Authority rules nonnegotiable a union proposal which would prevent the agency from denying a request for annual leave for the days on which an employee's suspension would be effective. The proposal was made by the National Treasury Employees Union to the Federal Deposit Insurance Corporation.

The law governing the use of leave states that leave days are those on which an employee would otherwise work and receive pay. Another law defines suspension as placing a worker, for disciplinary reasons, in a temporary status without duties and pay.

The Authority accordingly reasoned that because the NTEU proposal would require management to grant leave for a period when a suspended employee was in a nonduty, nonpay status, the result would be inconsistent with law. *(10 FLRA No. 67—October 22, 1982)*

Consultant

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82-24

The Federal Labor-Management

Consultant

United States of America
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Personnel Management

Route to:

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December 3, 1982

New Developments Checklist . . .

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New E.O. Limits Bargaining At Overseas Military Bases

In the interest of national security, President Reagan has partially suspended application of the Federal Service Labor-Management Relations Program to civilian employees of defense installations located overseas. Executive Order 12391 prohibits bargaining on any matter "which could substantially impair" the implementation of any treaty or agreement between the United States and the host country.

The order also excludes union-filed unfair labor practice complaints, grievances and arbitration concerning these matters. The Federal Labor Relations Authority may not claim jurisdiction.

Disputes as to whether a particular matter falls under the order will be decided by the Secretary of Defense. But before reaching a final decision, the DOD secretary must confer with the Secretary of State.

The order was prompted by a dispute between the National Federation of Federal Employees and a Korean army headquarters over the negotiability of two union proposals. One covered the rationing of products sold at post exchanges, and the other the number of cars federal employees could bring duty-free into Korea.

DOD refused to bargain, contending that army regulations on goods and cars are necessary to limit black market trading in Korea. Further, these regulations are part of the status of forces agreement (SOFA) between the U.S. and Korea, and as such are the equivalent of federal law. Since the proposals conflict with regulations and SOFA, they accordingly conflict with law.

Defense Department Goes to Court

When the Authority ruled the proposals to be negotiable, DOD went to court. The appeals court accepted the Authority's ruling on the post exchange proposal, but sent the car proposal back to the Authority for determination as to possible conflict with express SOFA provisions. (See *Consultant*, September 10, 1982).

Defense then took its case to the White House. The act allows the President, under 5 USC 7103(b), to exclude any agency from coverage for reasons of national security.

On November 4 the President invoked his statutory authority and issued the order. The order applies to DOD employees working outside of the U.S. and the District of Columbia, with the exception of those working in the Republic of Panama.

It is estimated that the order will affect 10,000 employees, including overseas teachers, who are in bargaining units represented by unions.

Another Year Older and Deeper in Debt

The Federal Labor Relations Authority rules that a union proposal prohibiting the Redstone Arsenal, Alabama from taking disciplinary action concerning indebtedness against an employee unless directed by a court is not negotiable.

Federal regulations require workers to pay just debts in a timely manner. They also require that agency rules on employee conduct, including indebtedness, provide for appropriate disciplinary action. Consequently, the Authority says, the proposal would prevent an agency from enforcing its regulations and thus be inconsistent with management's statutory right to discipline. *(10 FLRA No. 74—November 4, 1982)*

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A Deal Is a Deal

Management's letter to the union president reminding him that he was expected to honor a settlement agreement did not violate his statutory rights, the Federal Labor Relations Authority says. On the other hand, a subsequent letter from the Consumer Product Safety Commission threatening the labor official with disciplinary action if he invoked procedures protected by federal labor law was an unfair labor practice.

It all began in July 1978 when the agency denied a within-grade salary increase to the president of Local 3477, AFGE. A few months later, as the result of a September 18 incident involving the president and a Commission manager, the employee was suspended for three days.

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PM 1.13:

The Arbitration Roundtable

The case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Snow in Pensacola

Casefacts: On January 14, 1982 around 6:30 a.m., the Pensacola area experienced light snow and marginally freezing conditions. Six hundred employees of the Navy Public Works Center came to work, although 25 were several hours late due to traffic tieups. Nineteen employees—the grievants—were absent all day.

The grievants traveled from the same residential areas in which reporting employees had homes. There was no evidence that the grievants had any greater problems than other workers. In any event, the adverse weather conditions and traffic delays were over by the middle of the day, and the grievants could have reported to work in the afternoon.

The center's commanding officer granted administrative leave to employees who were justifiably late. He allowed the grievants to take one day of annual leave.

Commanding officers at several other major naval facilities in the area granted administrative leave to employees absent on January 14.

Under Article XIV of the contract between the center and the International Association of Machinists, when employee services are not needed for short periods of time because of bad weather or other unforeseeable circumstances, "the employer may direct the use of annual leave subject to certain conditions."

Federal Personnel Manual guidelines provide that agencies affected by the same emergency conditions should try to coordinate leave policies "to avoid confusion and promote equitable treatment of employees." An "emergency situation" is one preventing significant numbers of employees from reporting to work or necessitating an activity's closing.

A 1980 agency instruction tells commanding officers to charge annual leave to employees not reporting for duty if the activity is open as usual, although individual exceptions may be made.

On the day of the storm the sub-area coordinater sent a joint message to 40 naval facilities in Pensacola, urging coordination. Moreover "Emphasis should be placed on assuring that employees are treated equitably."

The grievants argued that they were not treated equitably since employees at nearby naval facilities were granted administrative leave. The agency rejoined that the argument was irrelevant because authority was delegated to each commanding officer. Bargaining unit members at the center were entitled only to be treated equitably within their unit.

Issue: Did the employer abuse its discretion by denying administrative leave to the grievants?

Award: Arbitrator Robert G. Williams sustained the grievance.

He judged that the grievants had no *contractual* right to administrative leave. Article XIV restricts, at management's discretion, the use of such leave to unforeseen situations when services are not needed. In this case the center had scheduled its regular activities.

The union's reliance on FPM guidelines also was erroneous. "While light snow in the morning may have been an exciting and novel occasion in Pensacola, Florida," it was not an emergency as defined in the guidelines. The weather did not prevent most center employees from reporting, and the center did not shut down.

The center's commanding officer was faced with a dilemma, Williams observed. The agency instruction clearly provided that the grievants be charged with annual leave because they had no excuse for absence after the bad weather was over. The joint message, on the other hand, called for equitable treatment, yet other activities did not charge absent employees with annual leave.

The arbitrator found that the grievants were entitled to equitable treatment. Once other activities granted administrative leave to absent employees, the grievants became entitled to the same treatment.

The award notes that it is limited to the January 14 circumstances. In future similar occurances, management still has discretion to determine that no emergency exists, or to limit all employees to annual leave.

Management must, however, apply the same interpretation and application of the policy to all employees affected by the same emergency. *(Navy Public Works Center and Lodge 192, International Association of Machinists—July 12, 1982. LAIRS #14276)*

BOOKSHELF

Spot Reviews of Publications and Films

In a recent study, the General Accounting Office calls for a reduction in the number of unfair labor practice charges and their related processing costs. This can be done, GAO suggests, if more disputes are settled informally.

The number of ULPs filed has doubled since enactment of the Civil Service Reform Act of 1978. In January-September 1979—the first nine months under the act—an average of 261 ULP charges were filed per month. The monthly average for Fiscal Year 1980 was 413. In FY 1981 it peaked at 537 per month, and filings then declined somewhat in the first eight months of FY 1982. (In each FY, the great majority of charges were filed by unions.)

Some federal officials speculated that the 1981 decrease might have been partially due to union uneasiness over budget cuts. Nevertheless, the Federal Labor Relations Authority, management and unions predicted that the number of ULPs filed will remain high in the future.

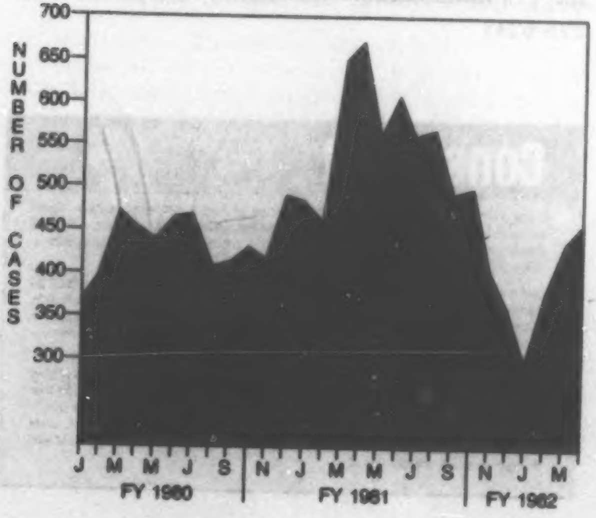
Processing Costs Are High

The study presents estimated costs of ULP charges to the federal government. The estimates are based on figures received from the FLRA and a sampling of agencies.

GAO considers the average cost of processing a nonmeritorious ULP charge (one which is dismissed by the Authority) to be about $2,062. The cost of a meritorious ULP ranges from $2,589 to $21,276, depending on the stage at which it is resolved. Using these estimates, the total cost for processing the 6,448 ULP's filed in 1981 might have run as high as $25.9 million.

Unfair Labor Practice Cases Filed With the FLRA

January 1980 Through March 1982



GAO Recommendations

GAO recommends three steps which would maintain the effectiveness of the process but at the same time reduce the impact on agency budgets:

- The Authority should require the parties involved in alleged ULPs to conduct informal discussions to resolve issues before filing a formal ULP charge investigated by the FLRA.
- To prevent situations giving rise to ULPs, OPM should develop guidelines for agencies to use in assessing managers' labor relations performance, where appropriate, and in implementing systems to monitor and evaluate the ULP process.
- OPM should work with the Authority's Office of the General Counsel (OGC) to determine how ULP information accumulated by the Authority can best be used to monitor and evaluate the ULP process.

The report also recommends that more training is needed to improve labor relations. Presently, not all managers receive this training, or it may be given in a sporadic and piecemeal fashion.

GAO points out that using negotiated grievance/arbitration procedures offers more opportunity to resolve disputes without third-party intervention. But because unions incur greater costs when using negotiated procedures, too many disputes are handled as ULPs. The OGC, however, advised that it is attempting to encourage greater use of negotiated procedures.

The study indicates that many ULPs allege that management failed to negotiate on changes in working conditions—many of which may have little or no effect on employees. A closer scrutiny of ULP charges to insure that they are filed only when changes substantially and materially affect bargaining unit members could diminish their number.

When GAO brought this to the Authority's attention, the OGC advised that it was issuing to FLRA field offices a policy statement which clarifies when to use FLRA's "substantial and material effect" test for determining the merits of a case.

The report expresses concern over FLRA's backlog of cases, since final ULP decisions which establish a precedent help reduce the need to file formal ULP charges. In this regard, the Authority forecast that budget cuts will increase its case-processing time, possibly resulting in an even longer backlog.

(continued on page 4)

Dear Subscriber,

This issue closes out Volume 82 of The Consultant. Volume 83 will begin with the next issue on January 21, 1983. Meanwhile, all of us extend to you and yours our

Season's Greetings

AND BEST WISHES FOR
CONTINUED SUCCESS THROUGHOUT THE NEW YEAR

...the Editor

(continued from page 1)

He filed several grievances and ULP charges over the denial of the pay raise and the suspension. He also filed a request for data under the Freedom of Information Act (FOIA).

In January the employer and the president signed a written agreement to resolve the pending disputes. Management agreed to reduce the suspension to a written reprimand and give him three days back pay, and to grant the within-grade increase in February.

The employee agreed to withdraw his pending grievances, ULP charges and FOIA requests, and to institute no further actions on the two controversies.

Carrying Out the Bargain

The agency carried out its side of the bargain. The employee, however, made other FOIA requests for data used by the agency in denying the increase, pursued an appeal with the Merit Systems Protection Board (MSPB), and filed ULP charges on the disputes.

On September 7, 1979 the employer sent him a memorandum outlining the terms of the settlement agreement. If he did not withdraw his appeals, charges and requests, the employer would take legal steps to enforce the agreement.

On January 15, 1980 management notified the president of a proposed 30-day suspension. The discipline was based on his insubordination and dishonest statements concerning an October 1979 episode.

The letter informed him that he was expected to follow adverse actions procedures in 5 CFR 752 (appeals to the MSPB), and that any deviation from the procedures might be grounds for further discipline.

The employee then charged that the employer's communications of September 7 and January 15 were threatening in nature and interfered with his rights under 5 USC 7116(a)(1).

The FLRA, determining that the September 7 memo sought only to enforce a commitment made by the employee, dismissed this ULP charge.

The January 15 letter was another matter. Because the letter in effect warned employees that they would be subject to discipline if they utilized procedures protected by law, e.g., ULPs or negotiated grievance procedures, it was a ULP. *(10 FLRA NO. 72—October 29, 1982)*

(continued from page3)

The report was directed to the Authority and OPM, which have 60 days to respond.

Steps Can Be Taken to Improve Federal Labor-Management Relations and Reduce the Number and Costs of Unfair Labor Practices is available from the U.S. General Accounting Office, Document Handling and Information Services Facility, P.O. Box 6015, Gaithersburg, MD 20760, telephone 202/275-6241.

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